76

No.

Supreme Court, U.S.
FILED
07-749 DEC 3 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2007

CHARLES W. WALKER, SR.,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187
COUNSEL OF RECORD

NATHAN Z. DERSHOWITZ
AMY ADELSON
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009
Attorneys for Petitioner

QUESTIONS PRESENTED

In assessing the government's Batson challenge to a criminal defendant's exercise of peremptory challenges:

1. Whether, if the appellate court determines that defense counsel's reasons for the exercise of peremptory challenges are race-neutral, reasonable and not pretextual, the appeals court *must* defer to the district court's credibility decision on whether defense counsel's reasons are "genuine;" alternatively, whether this Petition should be held until this Court decides the related question presented in Snyder v. Louisiana, No. 06-10119.

2. Whether the government has proven purposeful discrimination when there is a mixed motive for the defense exercise of a peremptory challenge and part of the motive is race-neutral and facially legitimate.

3. Whether combined race-gender groups (white males) constitute a cognizable class for purposes of determining whether the Equal Protection Clause affords constitutional protections to potential jurors against the use of peremptory challenges.

4. Whether a defendant's Sixth Amendment rights are violated when the trial court reseats jurors without determining whether the jurors are aware that they were eliminated by the defense and without granting the defendant replacement strikes.

5. Whether the Court should resolve a conflict over how to interpret 18 U.S.C. § 1346, the so-called

"honest services" statute, when applied to public officials.

6. Whether this Petition should be held until disposition of Gall v. United States (No. 06-7949) and Kimbrough v. United States (No. 06-6330) because defendant's non-Guidelines sentence implicates the questions that may be decided in those pending cases.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to the proceeding below are: Yolanda Monique Walker, The CWW Group, Inc., Georgia Personnel Services, Inc., and The Augusta Focus, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

I. THIS COURT SHOULD REVIEW THE STANDARDS APPLICABLE TO GOVERNMENTAL CHALLENGES TO A DEFENDANT'S EXERCISE OF PEREMPTORY CHALLENGES TO ENSURE THAT THE DEFENDANT'S SIXTH AMENDMENT RIGHTS TO COUNSEL AND TO AN IMPARTIAL JURY TRIAL REMAIN PROTECTED 11

1. The Court Should Address The Standard Of Appellate Review In A "Reverse-Batson" Case To Decide Whether The Appellate Court Must Defer To A District Court's Finding That Defense Counsel's Race-Neutral Reasons For A Strike Are Not "Genuine," Even Though The Appellate Court Determines That The Reasons Are Reasonable And That There Is No Evidence Of Pretext 14

2. The Court Should Resolve A Conflict Over Whether White Males Constitute A Cognizable Group Protected By The Equal Protection Clause 17

3. The Court Should Resolve A Conflict As To Whether The Government Proves Purposeful Discrimination When The Defendant Has A Mixed Motive For Exercising Peremptory Strikes 20

4. The Court Should Resolve Whether The Remedy Of Reseating Stricken Jurors And Eliminating Defendant's Peremptory Challenges

Comports With A Criminal Defendant's Sixth Amendment Rights 21

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW TO INTERPRET THE "HONEST SERVICES" STATUTE SO THAT IT COMPLIES WITH DUE PROCESS 24

III. THE COURT SHOULD HOLD THIS PETITION PENDING DECISIONS IN GALL V. UNITED STATES AND KIMBROUGH V. UNITED STATES, WHICH MAY IMPACT ON THE SENTENCING DECISIONS MADE IN THIS CASE 30

CONCLUSION 31

APPENDIX

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated July 6, 2007 ..... App. 1

Order Denying A Petition For Rehearing and Rehearing En Banc, dated September 10, 2007 ..... App. 33

Opinion of the District Court, dated May 31, 2005 ..... App. 35

TABLE OF AUTHORITIES

CASES

Batson v. Kentucky,
476 U.S. 79 (1986) ..... passim

Castaneda v. Partida,
430 U.S. 482 (1977) 18

Foster v. Nevada,
121 Nev. 165, 111 P.3d 1083 (2005) 22

Gall v. United States,
No. 06-7949 30

Georgia v. McCollum,
505 U.S. 42 (1992) 2, 12, 14

Howard v. Senkowski,
986 F.2d 24 (2d Cir. 1993) 20

J.E.B. v. Alabama,
511 U.S. 127 (1994) 18

Jones v. State,
343 Md. 584, 683 A.2d 520 (1996) 22

Kimbrough v. United States,
No. 06-6330 30

Koo v. McBride,
124 F.3d 869 (7th Cir. 1997) 22

McCrory v. Henderson,
82 F.3d 1243 (2d Cir. 1996) 22

McNally v. United States,
483 U.S. 350 (1987) 24, 25, 29

Miller-El v. Cockrell,
537 U.S. 322 (2003) 13, 15

Miller-El v. Dretke,
545 U.S. 231 (2005) 13, 15, 17

Peetz v. State,
180 S.W.3d 755 (Tex. Ct. of App. 2005) 22

People v. Motton,
39 Cal.3d 596, 704 P.2d 176 (Cal. 1985) 19

People v. Willis,
27 Cal.4th 811, 43 P.3d 130 (Cal. 2002) 22

People v. Washington,
257 Ill.App.3d 26, 628 N.E.2d 351 (Ill. App. 1993),
cert. denied, 516 U.S. 875 (1995) 19

Purkett v. Elem,
514 U.S. 765 (1995) 13, 14

Robinson v. United States,
878 A.2d 1273 (D.C. 2005) 19

Ex parte Sockwell,
675 So.2d 38 (Ala. 1995),
cert. denied, 519 U.S. 838 (1996) 20

Snyder v. Louisiana,
No. 06-10119 ..... 13, 16, 17

State v. Daniels,
109 Hawaii 1, 122 P.3d 796 (Hawaii. 2005) 19

State v. Gilmore,
103 N.J. 508, 511 A.2d 1150 (1986) 22

State v. Gonzales,
111 N.M. 590, 808 P.2d 40 (N.M. App.),
cert. denied, 806 P.2d 65 (1991) 19

State v. Lucas,
199 Ariz. 366, 18 P.3d 160 (Ariz. App.),
cert. denied, 534 U.S. 1014 (2001) 20

State v. McCollum,
334 N.C. 208, 433 S.E.2d 144 (1993),
cert. denied, 512 U.S. 1254 (1994) 22

Strauder v. West Virginia,
100 U.S. 303 (1879) 12

Swain v. Alabama,
380 U.S. 202 (1965) 11

United States v. Bloom,
149 F.3d 649 (7th Cir. 1998) 27, 28

United States v. Brumley,
116 F.3d 728 (5th Cir.) (en banc),
cert. denied, 522 U.S. 1028 (1997) 25, 26, 28

United States v. Burgos,
55 F.3d 933 (4th Cir. 1995) 25

United States v. Cochran,
109 F.3d 660 (10th Cir. 1997) 27

United States v. Darden,
70 F.3d 1507 (8th Cir. 1995),
cert. denied, 517 U.S. 1149 (1996) 20

United States v. Dennis,
804 F.2d 1208 (11th Cir. 1986),
cert. denied, 481 U.S. 1037 (1987) 19

United States v. Frost,
125 F.3d 346 (6th Cir. 1997),
cert. denied, 525 U.S. 810 (1998) 27

United States v. Gray,
96 F.3d 769 (5th Cir. 1996),
cert. denied, 520 U.S. 1129 (1997) 25, 27

United States v. Hausmann,
345 F.3d 952 (7th Cir. 2003),
cert. denied, 541 U.S. 1072 (2004) 26

United States v. Lopez-Lukis,
102 F.3d 1164 (11th Cir. 1997) 28

United States v. Martin,
195 F.3d 961 (7th Cir. 1999),
cert. denied, 530 U.S. 1263 (2000) 26, 28

United States v. Martin,
228 F.3d 1 (1st Cir. 2000) 27

United States v. Murphy,
323 F.3d 102 (3d Cir. 2003) 28

Unites States v. Nichols,
973 F.2d 1257 (7th Cir. 1991),
cert. denied, 502 U.S. 1080 (1992) 19

United States v. Panarella,
277 F.3d 678 (3d Cir.),
cert. denied, 537 U.S. 819 (2002) 27, 28

United States v. Pennington,
168 F.3d 1060 (8th Cir. 1999) 27

United States v. Ramirez-Martinez,
273 F.3d 903 (9th Cir. 2001),
overruled on other grounds,
484 F.3d 1186 (9th Cir. 2007) 22

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) (en banc),
cert. denied, 543 U.S. 809 (2004) ..... passim

United States v. Sawyer,
85 F.3d 713 (1st Cir. 1996) 25, 28

United States v. Stewart,
65 F.3d 918 (11th Cir. 1995),
cert. denied, 516 U.S. 1134 (1996) 13, 23

United States v. Sun-Diamond
Growers of California,
138 F.3d 961 (D.C. Cir. 1998),
aff'd in part, 526 U.S. 398 (1999) 27

United States v. Thompson,
484 F.3d 877 (7th Cir. 2007) 26, 27

United States v. Vinyard,
266 F.3d 320 (4th Cir. 2001),
cert. denied, 536 U.S. 922 (2002) 27

United States v. Walker,
490 F.3d 1282 (11th Cir. 2007) 1

United States v. Waymer,
55 F.3d 564 (11th Cir. 1995),
cert. denied, 517 U.S. 1119 (1996) 25

United States v. Welch,
327 F.3d 1081 (10th Cir. 2003) 25

Wallace v. Morrison,
87 F.3d 1271 (11th Cir.),
cert. denied, 519 U.S. 1044 (1996) 20

CONSTITUTION, STATUTES AND RULES

U.S. Const.,
Amend. V 1
Amend. VI 1, 19
Amend. XIV 2

28 U.S.C.,
§ 1254 1

18 U.S.C.,
§ 1341 24
§ 1343 24
§ 1346 24
§ 3553 30

Federal Rules of Criminal Procedure,
Rule 24 6

OTHER AUTHORITIES

Covey, Russell D., The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection, 66 Md. L. Rev. 279 (2007) 20

Jefferson, Thomas, First Inaugural Address, March 4, 1801 12

Stoltz, Brian W., Note, Rethinking The Peremptory Challenge: Letting Lawyers Enforce The Principles of Batson, 85 Tex. L. Rev. 1031 (March 2007) 12

Urbanski, Jennifer Lee, Note, Georgia v. McCollum: Protecting Jurors From Race-Based Peremptory Challenges But Forcing Criminal Defendants To Risk Biased Juries, 24 Pac. L.J. 1887 (1997) 11

134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988) 25

134 Cong. Rec. S17376 (daily ed. Nov. 10, 1988) 25

The Sega Times, Vol. 7, Issue 6, July, August 2003 7

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at United States v. Walker, 490 F.3d 1282 (11th Cir. 2007) and is set forth at App. 1. The Order denying a petition for rehearing and rehearing en banc was entered on September 10, 2007 is unreported and is set forth at App. 33. The Opinion of the District Court, dated May 31, 2005, is unreported and is set forth at App. 35.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on July 6, 2007. (App. 1) Petitioner timely filed a petition for rehearing and for rehearing en banc, which were denied on September 10, 2007. (App. 34) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.... and to have the Assistance of Counsel for his defense.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of

law ...

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State ...deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Fifteen years ago, Justice Thomas predicted that "black criminal defendants will rue the day" that the exercise of peremptory challenges became subject to Constitutional protection. Georgia v. McCollum, 505 U.S. 42, 60 (1992) (Thomas, J., dissenting). The conduct of jury selection in this case proves the prescience of those words.

Petitioner Charles W. Walker, Sr. has long been a prominent public figure in the State of Georgia. In 1990, after serving several years in the Georgia General Assembly, Mr. Walker was elected to the Georgia State Senate. In 1996, he became the first African-American in Georgia's history to be elected as State Majority Leader. Senator Walker is well-known in Georgia for having led a highly controversial fight to revamp the Georgia State flag to eliminate symbols of the Confederacy.

In 2002, Senator Walker, who had recently lost his bid for re-election, was specifically targeted for investigation by Richard S. Thompson, then United States Attorney for the Southern District of Georgia. Mr. Thompson achieved his own notoriety when he was forced to resign after the Office of Professional

Responsibility of the Department of Justice found that Thompson had "abused his authority and violated the public trust" by using his office to initiate criminal investigations for the "purposes of benefitting political and personal allies." (Letter from H. Marshall Jarrett, dated 2/13/04) Senator Walker was one of several prominent Georgia Democrats targeted for investigation. His investigation and prosecution is now the subject of Congressional inquiry. (Opening Statement of Congresswoman Linda Sanchez at Joint Hearing on Allegations of Selective Prosecution, dated 10/23/07)

STATEMENT OF THE CASE

In 2004, Senator Walker was indicted and charged with five schemes to defraud and tax violations that the government somehow manipulated into a 142-count indictment. The crux of the indictment involved so-called "honest services" fraud. One scheme, for example, alleged that a local hospital, in order to curry favor with Walker, used a temporary personnel agency in which Walker had an interest for its staffing needs. Another scheme alleged that two companies in which Walker had an interest transacted business with the Medical College of Georgia, which was alleged to be in violation of State law. Still another scheme alleged that Walker, who was the publisher of the Augusta Focus, a local newspaper, defrauded advertisers by overstating the newspaper's circulation – allegations that rarely, if ever, give rise to federal prosecution.

From the outset of this case, the government actively took steps to skew the racial composition of the jury. First, it enlarged the jury pool to reduce the representation of minority jurors. Second, it used 100%

of its peremptory strikes to eliminate African-American and minority jurors. And third, it asserted a Batson challenge to the defense counsel's exercise of peremptory strikes, resulting in the reseating of four white male jurors, and the unseating of two female African-American jurors, and, ultimately, in a racially unbalanced jury.

The Walker indictment was filed in the Augusta Division of the Southern District of Georgia, where most of the alleged illegal conduct took place. The Augusta Division, which is made up of five counties, has the largest voting-age African-American population in the District. As its first step towards ensuring that there were fewer minority jurors available to sit on Walker's jury, the government, professing concern over the ability to impanel an impartial jury, took the extraordinary step of moving to either change venue or to select a district-wide jury, *excluding the Augusta Division*. That meant excluding from the jury venire approximately 60,000 otherwise eligible African-Americans because of the *possibility* of exposure to media coverage – a reason that, standing alone, would not even provide grounds for a "for cause" elimination of a single juror.

The government was partly successful. Over the defendant's objections, and without any inquiry into whether a fair and unbiased jury could be chosen from the Augusta Division alone, the court ordered a district-wide venire that included all six divisions of the Southern District of Georgia, including the Augusta Division.

The Augusta Division, at the time, was 37% African-American. The district-wide venire was only

31% African-American. Thus, even before the voir dire process had begun, the government had effectively reduced the number of African-Americans in the jury pool from 37% to 31%, a reduction of nearly 20%. If the court had excluded the Augusta Division, as the government requested, the resulting jury venire would have been only 28% African-American.

This restructuring of the jury pool was an indication of what was to come. Prior to jury selection, the members of the venire completed a questionnaire. Seventy potential jurors were present in the courtroom for jury selection. Individual voir dire was conducted on thirty-three of those jurors who had indicated that they had either been exposed to pre-trial publicity or otherwise had concerns over their ability to be impartial. Some were removed for cause; forty-seven remained in the jury pool.

Of the forty-seven, the court randomly selected forty-two to create a pool that consisted of twenty-eight potential jurors, eight potential alternates, and six "extras." The twenty-eight potential jurors consisted of twelve white males, six white females, one black male, eight black females and one Indian male, or, put another way, eighteen whites, nine blacks and one other minority. The jury pool was 64% white, 32% African American and 5% minority.[1] Additional voir dire was conducted and continued well past 5:00 p.m. Because of the hour, both sides consented to the release of all but the twenty-eight potential jurors and eight potential alternates.

---

[1] The eight potential alternates consisted of four white males, two white females, and two black females. The issue before this Court does not involve the alternate jurors.

The process of exercising peremptories continued throughout the evening. As to the twenty-eight, the government used only five of its six strikes (F. R. Crim. Pro., Rule 24), but it used *all* of them to remove five of the ten minority jurors. Thus, the government exercised 100% of its strikes to remove half of the minority jurors. The defense exercised its ten strikes to remove ten white males, thus exercising 100% of its strikes against white males, but still leaving seven white jurors on the 12-person jury.

Both sides asserted Batson challenges. Defense counsel provided a reason, unrelated to race, to explain each of the ten strikes. The government too justified its striking of the five minority members.[2] Even though the government had used 100% of its challenges against minorities, the court found that the defense did not even make out a *prima facie* case; it further found no purposeful discrimination because the government had not used all of its peremptories. (Tr. 5/23/05 at 276-78) In contrast, the court found that the government *had* made out *a prima facie* case. (Id. 278) The court upheld the challenges as to six of the jurors but was "troubled by the articulation" relating to four of the jurors.[3] (App.

---

[2] One juror was in the funeral home business and Mr. Walker had been involved with the Georgia Funeral Home Association. Another juror had a blind mother and a disabled husband and the government was afraid she would be distracted. Another was evasive. Another served as a doorkeeper in the State legislature and admired the defendant. (Tr. 5/23/05 at 270-74)

[3] Of the six, defense counsel explained that it struck one juror because he was evasive, had served on a grand jury, and indicated that he read the Augusta Chronicle, a conservative newspaper that opposed Senator Walker, on a daily basis. Another juror was dismissed because he had a BA in accounting and read the Augusta Chronicle, but claimed not to know anything about the

15) They were:

AH: The defense explained that it used a peremptory against *AH* because he had a BBA in Finance, and worked as an accountant for a large company. Because of the tax counts and the government's intention to prove fraud related to accounting issues, the defense argued that it had a strategic reason for not wanting anyone on the jury with accounting expertise. The government countered that the defense had not struck a *white* female juror, who was not an accountant, though she worked as an office manager at small company. (Id. at 258-59)

KM: The defense explained that it dismissed this juror because he had served on a local city council, and the defense did not believe it appropriate for *any* elected official to serve on the jury. The government could not refute this, but noted, irrelevantly, that the defense had not solicited information about the juror's party affiliation. (Id. at 267)[4]

---

case, which the defense found incredible. A third juror knew an investigator for the United States, belonged to a yacht club and listened to conservative news. A fourth knew someone who worked for the FBI, and listened to conservative news and Christian radio stations. The fifth worked for the Department of Defense, and listened to Christian radio stations, and, a sixth, read the Drudge Report and listened to Rush Limbaugh and other conservative talk shows. (Tr. 5/23/05 at 260-264)

[4] Defense counsel had the right instincts about the danger of seating an elected official. *KM* was reseated by the trial court (and became foreman of the jury). After trial, the defense learned that, in 2003, as a city councilman, *KM* received a $500,000 grant for his city from Governor Sonny Perdue, a political opponent of Senator Walker. *The Sega Times*, Vol. 7, Issue 6, July, August 2003.

DS: The defense explained that it removed this juror because it had problems with "his body language" and because he watched Fox News and spent fifteen years in the military. The government had no evidence to demonstrate that this was not the reason for the strike. (Id. at 266)

JM: The defense struck this individual because he was a supervisor with a public institution, a Housing Authority, and oversaw sixty employees. (Id. at 268) The government again raised as purported proof of pretext, the defense acceptance of the *white* female juror who worked as an office manager.

Though it did not point to anything in the record to reflect purposeful discrimination, the court found that the reasons proffered for the four strikes were either not "sufficient" or were not "real."[5] The court then decided that it would reseat the four jurors and the defense would "lose those challenges." (Id. at 281-82) The effect was to remove the last four jurors seated, two of whom were African-American.

---

[5] As to *KM*, who had a connection to a political foe of Senator Walker's, the court summarily found that his service as a city councilman "is simply not the reason why he was struck." (Tr. 5/23/05 at 281) As to *AH*, the court acknowledged that he had expertise in the field of accounting, yet, inexplicably, found that he was not persuaded that this was a "genuine race neutral reason for elimination." (Id. at 298) As to *JM*, the court stated, without pointing to any evidence, that "the articulated reason is not a genuine race neutral reason." Finally, as to *DS*, the court found that his "unspecified body language" (App. 14) was not a "sufficient to persuade him that the reasons was race neutral." (Id. at 279, 281.)

The defense objected both to the conclusion and to the remedy, and unsuccessfully moved for a mistrial and the impanelment of a new jury. (Id. at 283) (Tr. 5/24/06 at 11-12) A week later the court issued a written decision that failed to specify what evidence supported an inference that defense counsel was not being "genuine" about the reasons he had provided for striking these four jurors. (App. 14) The court simply concluded that the reasons were not the "real reasons" for the strikes. (App. 14-15)

Because of the court's ruling (and the elimination of two African-American female jurors to be replaced by white male jurors), the jury consisted of five white males, four white females, one African-American male, and two African-American females – that is, nine whites and three African-Americans. (App. 37) Although, the jury, before the reverse-Batson challenge was 63% white and 37% African-American, the result was a jury that was 75% white and only 25% African-American – a racial composition that did not even reflect the racial composition of the expanded jury pool.

Senator Walker was convicted, among other things, of "honest services" fraud and was sentenced to 121 months, a sentence that represented an upward departure from the Sentencing Guidelines.

On appeal, the defendant challenged the court's seemingly arbitrary, hand-picking of these four jurors. The Court of Appeals for the Eleventh Circuit was "troubled," but affirmed. (App. 15) First, the Court skirted the issue of whether the government had made out a *prima facie* case because the defense had only struck white males, who do not constitute a cognizable class for Equal Protection purposes. Instead, the

Eleventh Circuit upheld the lower court's determination, made without any findings and despite the defense acceptance of *all* the white females in the jury pool, that the defense had engaged in discrimination solely based on race. (App. 14-15)

Next, the Court held that the defense had "clearly" articulated race-neutral reasons for the strikes. (App. 15) Thus, it became the government's burden to prove that the race-neutral reasons were pretextual. As to this, the Court of Appeals noted that, "*We find it difficult to conclude that the government satisfied its burden of showing that these four strikes were pretextual, when similar evidence was rejected for the other strikes.*" (App. 15) Nonetheless, though "troubled by the weakness of record evidence in support of these four Batson challenges," the Court held that it was "*constrained to defer to the district court's findings on the genuineness of these reasons*, and, correspondingly, on the *likelihood* of purposeful discrimination." (App. 16)

The Court also upheld the remedy. (App. 19) The Court pointed out, ironically in light of the defense objections, that the jury was drawn from the district, not just the division, so many of the jurors had to drive several hours to attend. Also, at the end of the day, defense counsel had consented to the release of the extra jurors. "Replacement strikes would have required that the court start anew the next day, at considerable time and expense." (App. 19) Though the Court opined that it might be "better practice" to "begin afresh," it concluded that it was not an abuse of discretion to simply reinstate the jurors. (App. 19)

Senator Walker also challenged the application

of the "honest services" statute to two of the five schemes to defraud: the "Grady Hospital" counts, which involved a private hospital's contracts with a temporary employment agency owned by Walker; and the "Medical College of Georgia" counts, which involved the allegation that Walker improperly transacted business with the Medical College, a State entity, without disclosing his interest in the personnel agency. The Eleventh Circuit upheld his convictions. (App. 31-32)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE STANDARDS APPLICABLE TO GOVERNMENTAL CHALLENGES TO A DEFENDANT'S EXERCISE OF PEREMPTORY CHALLENGES TO ENSURE THAT THE DEFENDANT'S SIXTH AMENDMENT RIGHTS TO COUNSEL AND TO AN IMPARTIAL JURY TRIAL REMAIN PROTECTED

Peremptory strikes have "very old credentials." Swain v. Alabama, 380 U.S. 202, 212 (1965). They serve a valuable purpose in the criminal justice system. Most importantly, they protect the defendant when defense counsel intuits unspoken bias on the part of a juror. See Urbanski, Jennifer Lee, Note, Georgia v. McCollum: Protecting Jurors From Race-Based Peremptory Challenges But Forcing Criminal Defendants To Risk Biased Juries, 24 Pac. L.J. 1887, 1931 (1997).

Nevertheless, because racial discrimination by the government in the jury selection process offends the Equal Protection Clause, Strauder v. West Virginia, 100

U.S. 303 (1879), this Court has placed limits on the exercise of peremptories. A criminal defendant has a constitutional right to a jury that has not been chosen in a racially discriminatory manner. Batson v. Kentucky, 476 U.S. 79 (1986). So, too, the jurors themselves have an Equal Protection right not to be excluded based on race, a right that can be protected, in a criminal case, by the prosecutor. Georgia v. McCollum, 505 U.S. 42, 56-57 (1992).

But a criminal defendant stands in very different shoes from a prosecutor. A criminal defendant is the "focal point of any criminal prosecution." Stoltz, Brian W., Note, Rethinking The Peremptory Challenge: Letting Lawyers Enforce The Principles of Batson, 85 Tex. L. Rev. 1031, 1045 (March 2007). After all, it is the defendant who faces the potential loss of life, liberty and property. And it is the defendant who has a Sixth Amendment right to counsel and to a fair and impartial jury, one of the principles "that form the bright constellation" guiding the creation of the federal government. Thomas Jefferson, First Inaugural Address, March 4, 1801. Though the Court has not precisely articulated the "exact hierarchy of rights at stake in jury selection," 85 Tex. L. Rev. at 1045, the Court has recognized that, because a criminal defendant has the "right to an impartial jury that can view him without racial animus," a defendant may exclude a juror even if race plays some consideration in the decision if the defendant believes that the juror may harbor racial prejudice. McCollum, 595 U.S. at 58, 59.

The standards that the lower courts have applied when the prosecutor has engaged in purposeful discrimination and when the criminal defendant has exercised potentially discriminatory jury strikes have

not differed. See, e.g., United States v. Stewart, 65 F.3d 918 (11th Cir. 1995) (same standard of review applies in "reverse Batson" cases because, despite the impact on the defendant's right to a fair trial, the effect on the excluded juror is the same), cert. denied, 516 U.S. 1134 (1996).

Yet there *are* different concerns. This Court, in recent years, has continued to examine how to apply Batson when it is the government that discriminates. Purkett v. Elem, 514 U.S. 765 (1995); Miller-El v. Cockrell, 537 U.S. 322 (2003) ("Miller-El I"); Miller-El v. Dretke, 545 U.S. 231 (2005) ("Miller-El II"). This Term, the Court will again address the issue in Snyder v. Louisiana, No. 06-10119. But it has not revisited the so-called "reverse Batson" scenario to clarify whether the same standards should apply and to resolve the many open questions that directly affect a defendant's Sixth Amendment rights.

This Petition provides this Court with an ideal opportunity to address several of those questions: first, how much deference must the appellate court accord the trial court's purported "credibility" determination when the defense counsel has articulated a race-neutral reason for a strike and there is no specific evidence pointing to purposeful discrimination; second, whether, in ferreting out hidden racial bias, defense counsel may consider a juror's race, provided race-neutral reasons also support the challenge; third, whether white males constitute a cognizable group entitled to Equal Protection in the jury selection process; and, fourth, whether it is fundamentally unfair to reseat jurors who may know they were rejected by the defense and then to reduce the number of defense strikes.

This Petition not only raises these important and recurring questions, which have created conflict among the lower courts, it allows the Court the opportunity, which it has not taken since McCollum, to more closely examine the interplay between the defendant's Sixth Amendment rights and the potential juror's Equal Protection rights, and to provide guidance on how a criminal defendant's rights can be protected when the government, purportedly representing the constitutional interests of the excluded jurors, successfully opposes a defendant's peremptories, resulting, as here, in a racially unbalanced jury.

1. The Court Should Address The Standard Of Appellate Review In A "Reverse-Batson" Case To Decide Whether The Appellate Court Must Defer To A District Court's Finding That Defense Counsel's Race-Neutral Reasons For A Strike Are Not "Genuine," Even Though The Appellate Court Determines That The Reasons Are Reasonable And That There Is No Evidence Of Pretext

The prosecutor's first burden under Batson is to make out a *prima facie* case. The burden then shifts to the defense to articulate race-neutral reasons for the strike. A race-neutral reason "does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 768. All that the defense must do is assert a reason that, on its face, is racially neutral. The defense in this case "clearly" met its burden. (App. 14) That shifted the burden to the prosecution to prove purposeful discrimination. Id.

In this case, the courts below agreed that defense counsel had articulated race-neutral reasons for

exercising the four contested peremptories. The appeals court also concluded that those reasons were reasonable and that there was no evidence that they were pretextual. Yet, on the third Batson test, the appeals court "felt constrained" to defer to the district court's findings, not that there *was* discrimination, but rather that there was some "*likelihood*" of discrimination. (App. 16)

It is this third part of the Batson formula that has continued to plague the courts. State-sponsored exclusion of African-American jurors is a systemic problem. This Court has grappled with how, in the face of this problem, the lower courts should evaluate the validity of a prosecutor's race-neutral reason for a peremptory challenge. In Miller-El I, the Court noted that the difficulty arises because the issue often comes down to a determination of whether the prosecutor is credible, a determination that generally is accorded deference. 537 U.S. at 339. Yet, even in the extremely deferential area of federal habeas review, *"deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief."* Id. at 340. In Miller-El II, the Court reaffirmed that deference to the trial court's findings is not absolute. 545 U.S. at 240. The trial court cannot simply make a credibility determination once a prosecutor articulates race-neutral reasons. Instead, the court must examine "all relevant circumstances," which includes a comparative assessment of whether the prosecutor failed to exercise strikes against similarly situated non-racial minorities, as well as factors separate from the actual voir dire, such as historical practices that reflect systematic discrimination on the basis of race. Id. at 240, 253-66. Though the trial judge is in the best position to evaluate credibility, the appellate court must

consider the "totality" of the circumstances to decide whether there has been purposeful discrimination. Id.

The standard of review is once again before the Court this Term in Snyder v. Louisiana. There, the Louisiana Supreme Court, on direct appeal, essentially accorded the trial judge's summary acceptance of a prosecutor's race-neutral reasons virtually complete deference. As Petitioner argues in Point IV of his Brief on the Merits, that level of deference essentially eviscerates appellate review.

The issue posed in Snyder is presented here, only in reverse and in a very different historical context. Here, the defense articulated race-neutral reasons for exercising the four strikes. The prosecution failed to meet its burden of showing, with actual record evidence, that those reasons were pretextual. Instead, the trial court summarily decided that the reasons were not "real," choosing, on the basis of some undefined standard, to disbelieve defense counsel. But the court did not point to evidence to support that conclusion, and the "totality of the circumstances" suggested otherwise.

First, the defense did not have a history of discrimination. To the contrary, it was the government that initially altered the racial composition of the jury by moving it from a division to a district-wide venire. Second, the defense did not differ in its questioning of white males and other potential jurors. Third, the government used its peremptories to strike only minorities. And, fourth, the government did not prove that a single black juror was accepted for reasons that paralleled the reasons offered by the defense for the four disputed strikes.

The exercise of peremptory challenges inherently involves intuition, subjective judgments that cannot be objectively measured. Miller-El II, 545 U.S. at 268-69 (Breyer, J., dissenting). Defense counsel, to serve his client's interests, must use his best subjective judgment to root out prejudices among potential jurors. That evaluation is based on experience, instinct and other intangibles. In a "reverse-Batson" situation, the prosecutor must prove intentional discrimination (not just the "likelihood" of discrimination) through comparative or other evidence. The critical decision of whether to accept a facially legitimate and reasonable defense strike cannot be left to whether the judge, who cannot "get into" counsel's mind, decides that defense counsel is not "credible."

The Eleventh Circuit had problems with the decision of the trial court, but ultimately it accorded unfettered deference to that decision because the trial court correctly stated the law. (App. 17) Whether that is the appropriate standard of review on direct appeal should be examined in the context of a "reverse-Batson" case because of the impact a successful governmental challenge has on a defendant's Sixth Amendment rights. At a minimum, this Court should hold this Petition until it decides Snyder v. Louisiana, so it can determine whether the decision in Snyder requires a remand of this case.

2. The Court Should Resolve A Conflict Over Whether White Males Constitute A Cognizable Group Protected By The Equal Protection Clause

The first step in any Batson claim is establishing the *prima facie* case. The excluded juror must be a member of a "cognizable group" protected by the Equal

Protection Clause. Batson, 476 U.S. at 96. A cognizable group is "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." Castaneda v. Partida, 430 U.S. 482, 494 (1977). Obviously, race constitutes a cognizable group. So, too, given the history of discrimination against women on juries, does gender *alone*. J.E.B. v. Alabama, 511 U.S. 127 (1994).

This Court has never decided whether white males, by themselves, constitute a cognizable group protected by the Equal Protection Clause. Nor has the Court examined the more complex question of whether the Equal Protection Clause is violated when a criminal defendant excludes a juror not because of his race and not because of his gender, but because defense counsel honestly believes that, among other factors, a juror's race combined with his gender suggests that he is likely to be antagonistic to the defense.

The courts below avoided this issue. The district court, although it initially stressed that the exclusion was of "white males," (Tr. 3/23/05 at 278), in its written decision eight days later, with no basis in the record, determined that race alone was the reason for the strikes. (App. 46) That finding, accepted by the Eleventh Circuit (App. 16), was clearly erroneous. The defense did not strike *any* of the six white females on the jury pool. Race, by itself, did not enter the picture. To the extent race or gender was considered, the defense plainly harbored suspicions only about the impartiality of white males.

The lower courts have disagreed over whether race plus gender constitutes a cognizable group. Some courts, including the Eleventh Circuit (at least prior to

this case), have held that subclasses of race or gender – that is, race plus gender classifications – are not discrete cognizable groups. See, e.g., United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986), cert. denied, 481 U.S. 1037 (1987); United States v. Nichols, 973 F.2d 1257 (7th Cir. 1991), cert. denied, 502 U.S. 1080 (1992); People v. Washington, 257 Ill.App.3d 26, 628 N.E.2d 351 (Ill. App. 1993), cert. denied, 516 U.S. 875 (1995). Other courts have held that race plus gender creates a cognizable class on its own. See, e.g, People v. Motton, 39 Cal.3d 596, 704 P.2d 176 (Cal. 1985) (en banc) (black women have experienced discrimination on two counts); State v. Daniels, 109 Hawaii 1, 122 P.3d 796 (Hawaii 2005) (prosecutor excluded white males); State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (N.M. App.), cert. denied, 806 P.2d 65 (1991) (Latino men).

This issue is strikingly important to the fair administration of the criminal justice system. Historically, African-American defendants have suffered most from discrimination in the jury selection process. When prosecutors mount Batson challenges it raises special constitutional concerns, particularly when the "class" that is purportedly excluded consists of white males, who have not experienced historic discrimination, and the effect of granting the reverse-Batson challenge is to create a jury that under-represents minority jurors. In this case, given Senator Walker's history of opposing Confederate symbols on the Georgia State flag – a highly controversial and racially charged issue – defense counsel, to effectively represent Senator Walker, had to carefully scrutinize white males, historically a "favored" class, to ferret out any racial bias. Before further eroding the peremptory challenge and with it the defendant's Sixth Amendment rights, this Court should decide whether subclasses of

race and gender themselves, and particularly white males, constitute a cognizable group for jury selection purposes.

3. The Court Should Resolve A Conflict As To Whether The Government Proves Purposeful Discrimination When The Defendant Has A Mixed Motive For Exercising Peremptory Strikes

A related question raises the so-called "mixed motive" challenge. Though defense counsel articulated race-neutral, strategic reasons for striking the four jurors, the trial court believed that race played some part in the decision. Even were that true, if there was also a race-neutral reason that supported the strike, the peremptory should have been allowed.

Mixed-motives challenges have engendered a wealth of confusing and conflicting decisions. See generally Russell D. Covey, The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection, 66 Md. L. Rev. 279 (2007). Some courts have held that purposeful discrimination has not been proven if there is a mixed motive, provided the party exercising the strike can show that the challenge otherwise would have had been exercised. See, e.g., Howard v. Senkowski, 986 F.2d 24 (2d Cir. 1993); United States v. Darden, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996); Wallace v. Morrison, 87 F.3d 1271 (11th Cir.), cert. denied, 519 U.S. 1044 (1996). Other courts have held that when a discriminatory reason has entered into the equation it so taints the process that the peremptory must be disallowed. See, e.g., Ex parte Sockwell, 675 So. 2d 38 (Ala. 1995), cert. denied, 519 U.S. 838 (1996); State v. Lucas, 199 Ariz. 366, 18 P.3d 160 (Ariz. App.), cert. denied, 534 U.S. 1014 (2001);

Robinson v. United States, 878 A.2d 1273 (D.C. 2005).

This Court should resolve this conflict, particularly as it plays out in the reverse-Batson scenario. Defense counsel must be acutely sensitive to the possibility that a potential juror may harbor a racial bias against his client, especially in a case, like this one, where the defendant has taken a controversial race-sensitive position on a public issue. Peremptory strikes allow defense counsel to at least try to impanel a racially unbiased jury. But if peremptories are to retain any value, the Court must clarify whether defense counsel may consider a juror's racial prejudices, even it if involves considering, in part, the juror's race, or whether the potential juror's rights "trump" the defendant's right to effective counsel and to an impartial jury.

4. The Court Should Resolve Whether The Remedy Of Reseating Stricken Jurors And Eliminating Defendant's Peremptory Challenges Comports With A Criminal Defendant's Sixth Amendment Rights

In Batson, this Court left open the question of what remedies are appropriate when the State exercises its challenges in a discriminatory manner.

> [W]e express no view on whether it is more appropriate in a particular case upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case .... or to disallow the discriminatory challenges and resume selection with the

> improperly challenged jurors reinstated on the venire.

476 U.S. at 99 n.24.

The courts in both the state and federal system, and in both Batson and reverse-Batson cases, have employed a variety of remedies. The following are just a sampling:

State Cases: Jones v. State, 343 Md. 584, 594, 683 A.2d 520, 525 (1996) (affirming the reseating of jurors); Foster v. Nevada, 121 Nev. 165, 111 P.3d 1083 (2005) (may reseat juror but peremptories should be exercised outside of the jury's presence and curative instructions should be given); People v. Willis, 27 Cal.4th 811, 43 P.3d 130 (Cal. 2002) (remedies include dismissing entire venire; sanctions against counsel); State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. denied, 512 U.S. 1254 (1994) (court not required to reseat jurors prosecutor improperly removed); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) (court must dismiss the entire venire); Peetz v. State, 180 S.W.3d 755 (Tex. Ct. of App. 2005) (upholding remedy of reseating stricken jurors and refusing to provide defense with replacement peremptories).

Federal cases: Koo v. McBride, 124 F.3d 869,873 (7th Cir. 1997) (upholding the reseating of the jurors improperly struck by both the defendant and the State); McCrory v. Henderson, 82 F.3d 1243, 1247 (2d Cir. 1996) (appropriate remedy is seating new juries or beginning "anew with a fresh panel"); United States v. Ramirez-Martinez, 273 F.3d 903, 910 (9th Cir. 2001) (reseating two jurors struck by prosecutor but, unlike

here, returning to the government two peremptory challenges), overruled on other grounds, 484 F.3d 1186 (9th Cir. 2007).

Though trial courts may be in the best position to fashion a remedy, some guidelines are needed lest "reverse Batson" challenges result in a hodgepodge of remedies, all technically permissible, without regard to whether the remedy chosen is fair under the circumstances of the particular case. Undoubtedly, some remedies prejudice the defendant. Here, for example, it requires a "suspension of disbelief" to assume, as did the Eleventh Circuit (App. 19), that the stricken jurors were unaware of who had excused them. Only blacks were excluded by the prosecutor and only whites were excluded by the defense. Yet, no inquiry was made into whether the four reseated white jurors knew that the defense had rejected them or whether that engendered negative attitudes towards the defense. Moreover, though defense counsel articulated both race-neutral and reasonable justifications for the strikes (App. 14), the defendant was deprived of the opportunity to exercise four more peremptories, and thus lost a full 40% of his peremptory strikes.

The reseating of jurors has the effect of displacing seated jurors – in this case, removing two African-American jurors and therefore creating a racially imbalanced jury. That will not always be the case. See Stewart, 65 F.3d at 923 (reseating of improperly removed black juror resulted in unseating of a black juror, so the end result, from a racial standpoint, was the same), cert. denied, 516 U.S. 1134 (1996). But when it is, as here, the trial court should consider alternative remedies that do not prejudice the defense or

significantly alter the racial balance of the jury.[6] Given the confusing and conflicting case law, this Court should clarify what factors the trial court must consider in a "reverse-Batson" case in fashioning the remedy for a defendant's discriminatory strikes.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW TO INTERPRET THE "HONEST SERVICES" STATUTE SO THAT IT COMPLIES WITH DUE PROCESS

The Grady Hospital and Medical School of Georgia schemes rested on the theory that Senator Walker committed fraud by depriving his constituents of his "honest services." Twenty years ago, in McNally v. United States, 483 U.S. 350 (1987), this Court held that the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, were limited to the protection of property rights, and that the "intangible right of the citizenry to good government" did not constitute a cognizable property right. Id. at 356. The Court concluded that, "if Congress desires to go further, it must speak more clearly than it has." Id. at 360.

Congress quickly responded by enacting 18 U.S.C. §1346, which defines a "scheme or artifice to defraud" to include "a scheme or artifice to deprive

---

[6] Here, there were several remedies that the trial court could have chosen that would not have prejudiced the defense: the court could have called back the jurors that were dismissed the prior evening to reseat four new jurors; it could have empaneled a new venire; or it could have provided the defense with four additional challenges to replace those which it had lost. Instead, it chose the remedy most devastating to the defense.

another of the intangible right of honest services."[7] Unfortunately, Congress did not "speak more clearly," failing to define "honest services" and leaving it to the courts to interpret and implement the statute. As a result, questions about the statute's meaning persist, among them: whether the statute applies to all fiduciaries or to public officials only; whether the victim can be a locality and its citizenry; whether the public official must be shown to have violated state law; and whether an ethical breach, standing alone, can constitute a federal crime.

There remains palpable discontent with the statute's ambiguity even among the courts that have upheld its constitutionality.[8] The First Circuit has remarked that the concept of honest services "eludes easy definition." United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996). The Second Circuit, in its deeply divided *en banc* decision in United States v. Rybicki, 354 F.3d 124, 135 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004), though upholding the statute, conceded it would have to "labor long and with difficulty in seeking a clear and properly limited meaning" of a

---

[7] Section 1346 was added as a last-minute amendment to the Anti-Drug Abuse Act of 1988; apparently, Congress's purpose was to overrule McNally. 134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988); 134 Cong. Rec. S17376 (daily ed. Nov. 10, 1988).

[8] Several Circuits have held that the statute is not so vague that it violates due process. See, e.g., United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004); United States v. Brumley, 116 F.3d 728 (5th Cir.) (en banc), cert. denied, 522 U.S. 1028 (1997); United States v. Welch, 327 F.3d 1081 (10th Cir. 2003); United States v. Gray, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); United States v. Waymer, 55 F.3d 564 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996); United States v. Burgos, 55 F.3d 933 (4th Cir. 1995).

scheme to defraud another of the intangible right to honest services. The Seventh Circuit has criticized the statute's imprecision. United States v. Thompson, 484 F.3d 877, 881 (7th Cir. 2007) (theory that local official deprived constituents of "honest services" by improperly implementing administrative code "has the potential to turn violations of state rules into federal crimes"); United States v. Martin, 195 F.3d 961, 967 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000) (noting "persistent concerns about the breadth and vagueness of the statute"); United States v. Hausmann, 345 F.3d 952, 956 (7th Cir. 2003), cert. denied, 541 U.S. 1072 (2004) (reiterating "doubts" about the statute's applicability to a breach of fiduciary duty "with nothing more").

Dissatisfaction with the statute has led to a substantial body of dissenting law arguing that the statute cannot pass constitutional muster. In Rybicki, four Judges of the Second Circuit dissented, noting that the courts have been unable to agree on the parameters of the statute and concluding that the "vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge." 354 F.3d at 163 (Jacobs, Walker, CJ., Cabranes and B.D. Parker, J., dissenting).

Likewise, in United States v. Brumley, 116 F.3d 728 (5th Cir. (en banc), cert. denied, 522 U.S. 1028 (1997), three members of the Fifth Circuit concluded that the statute was unconstitutional when applied to a politician's deprivation of the "honest services" owed to his constituency. Among other defects, the dissenting Judges noted that the statute fails to give adequate notice of what conduct is prohibited and, by its terms,

does not apply when the defrauded party is a political entity or its citizenry. 116 F.3d at 742-47 (Jolly, Moss & Smith, JJ., dissenting).

The Circuits are "fractured on the basic issues," both in the private and public context. Rybicki, 354 F.3d at 163 (Jacobs, J., dissenting).[9] When applied to public officials, as in this case, the standards are inconsistent. The Seventh Circuit requires some form of *quid pro quo*. United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998) (Section 1346 is limited to claims that the defendant "misused his office for private gain"); Thompson, 484 F.3d at 883 (private gain must be in nature of bribe). The Third Circuit has rejected Bloom, and has held that the statute is violated when a public official "conceals a financial interest in violation of state criminal law and takes discretionary action in his official capacity that the official knows will directly benefit the concealed interest... regardless whether the concealed financial interest improperly influenced the official's actions." United States v. Panarella, 277 F.3d 678, 680 (3d Cir.), cert. denied, 537 U.S. 819 (2002).

---

[9] In the context of a private employer/employee relationship, some Courts have required proof of a material misrepresentation or omission. Rybicki, 354 F.3d at 141-42; United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997); United States v. Gray, 96 F.3d 769, 775 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). Still other Circuits have required proof that the employee reasonably foresee that his employer will suffer some economic harm as a result of his breach. See, e.g., United States v. Vinyard, 266 F.3d 320, 327 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000); United States v. Pennington, 168 F.3d 1060, 1065 (8th Cir. 1999); United States v. Sun-Diamond Growers of California, 138 F.3d 961, 973-74 (D.C. Cir. 1998); aff'd in part, 526 U.S. 398 (1999); United States v. Frost, 125 F.3d 346, 369 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998).

The First Circuit has gone even further, suggesting that "honest services" fraud may be found whenever a public official intentionally breaches his or her fiduciary duty. United States v. Sawyer, 85 F.3d 713, 732 (1st Cir. 1996). And the Eleventh Circuit had held that there must be evidence of a *quid pro quo*, see United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997), but, in this case, retreated from that position, indicating that an undisclosed conflict alone can constitute "honest services" fraud. (App. 26)

There is also disagreement over whether a violation of state law is a prerequisite to commission of the federal offense. The Seventh Circuit has said that it is not, Bloom, 149 F.3d at 654; Martin, 195 F.3d at 967, and the First Circuit has agreed. Sawyer, 85 F.3d at 726. But the Third Circuit has required the government to show that the "conduct that amounts to honest services fraud is conduct that the state itself has chosen to criminalize." Panarella, 277 F.3d at 694. See also United States v. Murphy, 323 F.3d 102 (3d Cir. 2003). Still other Courts have insisted that the government prove a duty under state law, but not necessarily that breach of that duty constitutes a state crime. See, e.g., Brumley, 116 F.3d at 733-34 (state law must provide the basis for the honest services owed by the defendant).

This case illustrates just how the statute's ambiguity permits local governmental actions to be transformed into a federal crime. Here, Senator Walker, a prominent African-American Democrat, was specifically targeted for investigation for political reasons. There was no evidence that he ever received a *quid pro quo* in connection with any legislative action. Indeed, the jury was charged that it could find Senator

Walker guilty of "honest services" fraud if he received "a personal benefit from an undisclosed conflict of interest" or "fail[ed] to disclose a financial interest in a business that has a relationship with an institution affected by legislation." (Jury Charges, at 23) Based on the charge, as the Eleventh Circuit concluded, the jury could have found Senator Walker guilty solely because various entities, to curry favor, chose to retain his temporary employment agency and because Senator Walker did not properly disclose a potential conflict of interest as may have been required under State law. (App. 26)

This Court's intervention is critical. The very same problems that this Court acknowledged in 1987 have resurfaced, only to a greater degree because of the confusion over whether Section 1346 by itself revived pre-McNally law. While uniform interpretation of a criminal statute is always important, it is particularly critical when dealing with a fraud as amorphous as the deprivation of "honest services." In the public arena, "honest services" fraud implicates the delicate relationship between the federal government and the States, arming federal prosecutors (who may be politically motivated, as was former United States Attorney Thompson) with the power to prosecute State and local officials without any clear guidelines as to what conduct is criminally prohibited. The end result has been a hodgepodge of decisions that fail to provide any real limits on this federal intrusion into state and local government.

III. THE COURT SHOULD HOLD THIS PETITION PENDING DECISIONS IN GALL V. UNITED STATES AND KIMBROUGH V. UNITED STATES, WHICH MAY IMPACT ON THE SENTENCING DECISIONS MADE IN THIS CASE

Two cases currently pending before this Court, Gall v. United States, No. 06-7949 and Kimbrough v. United States, No. 06-6330, raise serious, potentially far-reaching questions about the constitutionality, interpretation and application of the Sentencing Guidelines, and the standards that govern when the sentencing court chooses to impose a non-Guidelines sentence. Here, there were significant sentencing disputes, including the application of an enhancement based on acquitted conduct. In addition, the court imposed a non-Guidelines sentence of 121 months, treating the Guidelines as advisory only. This variation from the Guidelines was not based on the Court's evaluation of the factors set forth in 18 U.S.C. § 3553(a), but rather on the court's disapproval of how "grouping" under the Guidelines impacted on the sentence. Whether that standard is appropriate and whether the sentence is constitutional are questions that should be held pending the decisions in Gall and Kimbrough.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

Alan M. Dershowitz
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187
COUNSEL OF RECORD

Nathan Z. Dershowitz
Amy Adelson
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Dated: December 3, 2007

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16756

D.C. Docket No. 04-00059-CR-001-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES W. WALKER, SR.,
THE CWW GROUP, INC.,
a.k.a. The Walker Group,
GEORGIA PERSONNEL SERVICES, INC.
THE AUGUSTA FOCUS, INC.

Defendants-Appellants,

Appeals from the United States District Court
for the Southern District of Georgia

(July 6, 2007)

Before EDMONDSON, Chief Judge, BIRCH and WILSON, Circuit Judges.

WILSON, Circuit Judge:

Charles W. Walker, Sr. was indicted by a grand jury in the Southern District of Georgia for conspiracy,

mail fraud, and tax evasion. The indictment charged Walker with misusing his public office for personal gain. Walker is a former Georgia state legislator, newspaper publisher, and businessman. He was charged along with three corporate defendants: The Augusta Focus, Inc. (the "Augusta Focus"), a local newspaper that Walker published; Georgia Personnel Services, Inc. ("Georgia Personnel"), a staffing company owned by Walker that provides temporary workers to hospitals and other companies; and The CWW Group, Inc. (the "CWW Group"), a holding company that owns other companies and is owned by Walker (collectively "Defendants"). Defendants appeal their convictions and Walker appeals his sentence, contending that (1) during jury selection, the district court erroneously disallowed four of Walker's peremptory strikes after finding a *Batson*[1] violation; (2) honest services mail fraud was improperly charged in the indictment and not supported by sufficient evidence; (3) prosecuting Walker for mail fraud violates basic principles of federalism; and (4) various sentencing enhancements were improperly imposed by the district court. Finding no reversible error as to any of these issues, we affirm.

Background

Walker operated his various businesses while simultaneously serving as a member of the Georgia General Assembly. The 142-count indictment first alleged that Walker, the CWW Group and the Augusta Focus engaged in a scheme to fraudulently obtain profits from businesses that advertised in the Augusta Focus by misrepresenting the newspaper's circulation.

---

1 *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The indictment alleged that this scheme amounted to mail fraud in violation of 18 U.S.C. §1341, and conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. (These charges are henceforth referred to as the ("Augusta Focus counts").[2]

The indictment further alleged that Walker, the CWW Group, and Georgia Personnel engaged in a scheme to misuse Walker's position as a state legislator for private gain by receiving business favors, including a contract to hire Georgia Personnel workers from Grady Memorial Hospital ("Grady"), in return for Walker's help with legislation affecting Grady. These counts (the "Grady counts") charged mail fraud in violation of 18 U.S.C. § 1341, and honest services mail fraud in violation of 18 U.S.C. § 1346.

Defendants were also accused of engaging in a scheme to improperly transact businesses with a state entity, the Medical College of Georgia ("the Medical College"), by: (a) misrepresenting to the Medical College that Walker did not own a substantial interest in Georgia Personnel or the Augusta Focus when he did; and (b) failing to disclose Walker's transactions with the Medical College on state-mandated financial disclosure reports (the "Medical College counts"). In Georgia, a state legislator is not permitted to engage in business with a state agency except in certain limited circumstances not applicable here.[3] The Medical College

---

2 Walker does not appeal his conviction on the Augusta Focus counts.

3 Georgia law includes a code of ethics and conflicts of interest, GA. CODE ANN. §§ 45-10-1 to -94, and the Ethics in Government Act, GA. CODE ANN. § 21-5-1 to -76. Section 45-10-24 (a)(1) states:

counts charged mail fraud in violation of 18 U.S.C. § 1341, and honest services mail fraud in violation of 18 U.S.C. § 1346.

The indictment further charged that Walker and the CWW Group engaged in a scheme to steal cash proceeds from annual fundraising events by C.S.R.A. Classic, Inc. ("Classic"), a charity set up by Walker. These forty-six counts (the"Classic counts") charged mail fraud, in violation of 18 U.S.C. § 1341, and conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. Walker was also charged with mail fraud and honest services mail fraud for misusing his political campaign funds, and with filing a false tax return with the Internal Revenue Service and helping prepare a false charitable tax return, in violation of 26 U.S.C. § 7206 (1).

After a jury trial, Walker was acquitted of the tax evasion charges and one of the Grady counts, but was found guilty on all other counts. The corporate defendants were also found guilty on all counts for which they had been charged. At sentencing, the court found that Walker had a criminal history category of I and a base offense level of 6. The court also found that the Augusta Focus and Classic counts should be grouped together under the United States Sentencing Guidelines. The total loss valuation for those counts was between $650,639.65 and $675,639.65, leading to an

---

[I]t shall be unlawful for any part-time public official who has state-wide powers for himself or on behalf of any business, or for any business in which such public official or member of his family has a substantial interest to transact any business with any agency.

adjusted offense level of 20.[4] Further, the district court ruled that the use of sophisticated means, abuse of trust, misrepresentation of a charity, and supervisory role Guidelines enhancements applied. This led to a total offense level of 29, which resulted in a Guideline sentence range of 87 to 108 months. The district court exceeded the advisory Guidelines and sentenced Walker to 121 months, finding that the Guidelines sentence did not sufficiently represent the criminal conduct involved.[5] With that background, we examine each issue presented for our review.

Discussion

I.

The *Batson* Challenges

Defendants first contend that the district court erred by sustaining the government's challenge to four of their peremptory strikes during jury selection in violation of *Batson v. Kentucky*. They also challenge the district court's remedy to correct the *Batson* violations

---

4 The court also grouped together the schemes involving Grady and the Medical College as group 2, the schemes involving campaign funds as group 3, and the schemes involving tax returns as group 4. However, because the offense level was highest for the combined Augusta Focus and Classic schemes, only those offenses were used to calculate the base offense level. *See* U.S.S.G. § 3D1.4

5 The corporate sentences were as follows: (1) the Augusta Focus was fined $34,000 and found jointly and severally liable, with Walker and the CWW Group, for restitution in amount of $212,700.77; (2) the CWW Group was fined $56,000 and found jointly and severally liable, with Walker, for restitution in the amount of $306,028.77; and (3) Georgia Personnel was fined $61,200.

by reinstating the four struck jurors and refusing to give Defendants four new peremptory strikes to compensate for the reinstated jurors.

Jury selection began with a pool of approximately seventy venire members and only lasted one day. The venire was drawn randomly from all six divisions of the Southern District of Georgia. The prospective jurors had earlier completed a questionnaire that asked them about any prior knowledge of the case. The questionnaire asked for information geared to determine their impartiality by learning their preferred news sources and other habits.

The court began jury selection with individual voir dire of the thirty-three potential juror who had been exposed to pre-trial publicity or had suggested that they could not be impartial. After some of them were excused for cause, forty-seven of the original seventy jurors remained in the pool. Of these, forty-two were randomly selected to create a new pool of twenty-eight potential jurors, eight potential alternate jurors and six more "just in case." The twenty-eight potential jurors consisted of twelve white males, six white females, one black male, eight black females, and one Indian male. The potential alternates who remained in the pool consisted of four white males, two white females, and two black females. Defendants exercised all twelve of their peremptory challenges while the government used six of its eight challenges. Defendants used all of their strikes against white males, removing ten of twelve white males from the pool of potential jurors and two white males from the alternate pool. If jury selection had ended there, these peremptory strikes would have resulted in a jury of two white males, five white females, one black male and four black females, and an

alternate pool of two white males, and two white females.[6]

The government and Defendants then objected to each other's peremptory challenges on the ground that they violated the principles set forth in *Batson v. Kentucky*. Prior to hearing each party's *Batson* argument, the court excused the six extra venire members.[7] The court then proceeded to consider the *Batson* challenges.

The government used all of its strikes against minorities. The court evaluated the government's strikes, and found them to be constitutional.[8] Then, the court asked Defendants to provide neutral explanations for each of their strikes. For jurors Lamb, McKinney, Wellman and Palmer, Defendants explained that they were struck because they watched conservative news shows, listened to conservative radio commentators, or listened to Christian Gospel radio stations. They argued that these programs tend to be critical of Democrats and expressed concern that the jurors would not be completely impartial in a case involving Walker, an African-American Democratic politician. In rebuttal, the government argued that since a minister and two female jurors who watched conservative news shows were not struck, the reasons given for these strikes were pretextual. For jurors Hoats and Spitz, Defendants

---

6 Because the prosecution did not use two of their designated strikes, the district court excused the last prospective juror, a white female, and the last prospective alternate juror, a black female.

7 Both parties consented to this dismissal.

8 Defendant's do not challenge this ruling on appeal.

claimed that they were struck because, as regular readers of a local newspaper, the Augusta Chronicle, they were familiar with the case. Defendants also claimed that these jurors were not fully forthcoming during questioning. The government challenged this explanation by comparing these jurors to a female juror who also had prior knowledge about the case and was not struck. Finally, Defendants explained that they struck juror Heape on the ground that he was a member of the Confederate Sons of America and that they struck juror Kennedy because he was a lawyer and former criminal investigator. The government did not rebut these explanations. After due consideration, the district court found these eight strikes of white males to be valid.

In contrast, the court found that Defendants' four other peremptory strikes of white males were improper, namely the strikes of jurors Houston, McGee, Strakal and Manders. Defendants stated that juror Houston was removed because they did not want an individual with a BBA in Finance and experience as an accountant serving as a juror on a case in which they planned to challenge accounting procedures. Defendants claimed that they struck juror McGee because of this experience working as a supervisor of a large number of employees. The government compared both jurors to a white female juror, Goodson, arguing that she was not removed even though she had similar financial acumen. Goodson, who had a high school education, worked as an office manager for a drug and alcohol screening company where she supervised five people. The district court found the strikes to be invalid.

Defendants also struck juror Strakal because they found his body language and demeanor to be

hostile. The government claimed that since Defendants' lawyers asked no questions of Strakal, they did not have the opportunity to evaluate Strakal's demeanor. Finally, Defendants said they struck juror Manders on the ground that he had served on a city council before, and they did not want an elected official on the jury. The government responded that this reason was pretextual absent knowledge of Mander's party affiliation or bias. The district court agreed and rejected both strikes. Finding the peremptory strikes invalid as to jurors Houston, McGee, Strakal, and Manders, the court ordered that these four jurors be returned to the jury box.

After the four jurors were re-seated, Defendants requested four additional peremptory challenges to replace the ones that had been rejected. However, all the extra venire members had previously been excused. Finding that granting additional strikes would require re-conducting jury selection with an entirely new venire, the court denied Defendants' request. On appeal, Defendants challenge both the merits of the *Batson* rulings and the remedy chosen by the district court.

The Three-Part *Batson* Test

The Equal Protection Clause forbids a prosecutor from striking potential jurors solely on account of their race. *Batson v. Kentucky,* 476 U.S. at 86, 106 S. Ct. At 1717. In *Georgia v. McCollum,* 505 U.S. 42, 59, 112 S. Ct. 2348, 2359, 120 L. Ed. 2d 33 (1992), the Supreme Court extended that restriction to strikes made by criminal defendants, and in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143, 114 S. Ct. 1419, 1429, 128 L.Ed. 2d 89 (1994), the Court held that strikes based n gender were also constitutionally impermissible.

In *Batson*, the Court laid out a three-part test to evaluate the validity of challenges to peremptory strikes. First, a moving party must make a prima facie showing that a peremptory challenge has been exercised on the basis of race or gender. *Batson,* 476 U.S. at 95-97, 106 S. Ct. At 1722-23. Once this requirement has been satisfied, the non-moving party must offer a race or gender-neutral basis for striking the juror in question. *Id. At 97-98, 106 S. Ct. At1723-24.* Third, in light of both parties has shown purposeful discrimination. *Id.* At 98, 106 S. Ct. 1724. In reviewing the district court's analysis, we give great deference to the district court's finding of whether a *prima facie* case of discrimination exists. *United States v. Stewart,* 65 F.3d 918, 923 (11th Cir. 1995). Once past the *prima facie* step, the district court's determination concerning the actual motivation behind each challenged strike amounts to pure factfinding, and we will reverse only if the decision is clearly erroneous. *Id.*

Defendants first argue that the government failed to make a prima facie case of purposeful discrimination. They argue that white males are not a legally protected group for *Batson* purposes. They further claim that in light of the overall jury composition, the fact that all of their strikes were against white males is insufficient to demonstrate a pattern of discriminatory strikes. They allege that instead of requiring the government to satisfy its burden of establishing a *prima facie* case, the district court largely ignored the first step and unfairly placed the burden on them to explain their strikes.

We have held a *prima facie* case must be established before there is any further inquire into the motives for the challenged strikes. *Untied States v. Ochoa-Vasquez,* 428 F. 3d 1015, 1038 (11th Cir. 2005).

While a moving party is required to present evidence other than the bare fact of juror's removal to satisfy this requirement, a pattern of strikes against all venire members of one race or gender is considered significant. *United States v. Allen-Brown*, 243, F.3d 1293, 1297 (11th Cir. 2001).[9] Indeed, when "a party strikes all or nearly all of the members of one race on a venire," we have noted that this pattern of strikes against "jurors of one race...may be sufficient by itself to establish a *prima facie* case." *Cent. Ala. Fair Hou. Ctr., Inc. v. Lowder Realty, Co.*, 236 F.3d 629, 637 (11th Cir. 2000).

Defendants correctly point out that a *prima facie* case requires a showing that a cognizable group was excluded, *Batson*, 476 U.S. at 96, 106 S. Ct. At 1723, and they argue that the district court erred in treating white males as such.[10]

---

9 In *United States v. Allen-Brown* we instructed the district court to take into account the totality of circumstances when deciding if the moving party has established a *prima facie* case. 243 F.3d at 1297-98. Specifically, we asked the courts to consider 91) whether there was a pattern of strikes against venire member of one race; (2) questions or statements during voir dire or in exercising challenges that suggested a discriminatory purpose; (3) the racial composition of the pool of remaining jurors; (4) the race of the defendant; and 95) the nature of the crime charged. *Id.*

10 The Supreme Court has not yet ruled whether constitutional protections afforded to race-based groups in *Batson*, and gender-based groups in *J.E.B. v Alabama ex rel. T.B.*, extended to combined race-gender groups. State courts examining this question under their own combined race-gender groups as cognizable groups. *See, e.g., Commonwealth v. Jordan*, 785 N.E. 2d 368, 380 (Mass. 2003) (finding that white males are cognizable group); *people v. Motton*, 704 P.2d 176,181 (cal. 1985) (treating black women as cognizable group); *State v. Shepperd*, 989 P.2d 503, 511 n.4 (Utah Ct. App. 1999) (calling a trial judge's assumption that white males are not cognizable group "erroneous"). But *see People*

However, the district court clearly stated that it did *not* treat white males as a category in of itself. Rather, the court determined that Defendants engaged in intentional discrimination based on race. There is enough evidence to support the district court's findings based on race, without considering the combined race-gender category[11] Defendants used all

---

v. Washington, 628 N.E.2d 351, 356 (Ill. App.Ct. 1993) (refusing to recognize black males as a cognizable group).

In *United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986), we declined to treat "black males" as a cognizable group for *Batson* purposes, and in *united States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991), the Seventh Circuit similarly declined to recognize "black females" as a discrete category. However, both these cases were decided before the Supreme Court banned gender-based challenges in *J.E.B v. Alabama ex rel. T.B* and the reasoning in both *Dennis and Nichols* suggested that their holdings were greatly influenced by the fact that gender was not considered a discrete classification. *See Nichols*, 937 F.2d at 1262 (noting that the *Batson* ruling is limited to the *racially* discriminatory use if peremptory challenges); Dennis, 804 F2d. At 1210 (discussing only whether black males were a "cognizable racial group"). Examining the issue after the Supreme Court's ruling in *J.E.B v. Alabama ex rel. T.B.*, the Ninth Circuit noted that race-gender groups are "worthy of consideration" in light of the changed law, although it declined to decide the issue on procedural grounds. *Turner v.Mmarshall*, 63 F.3d 807, 812 (9th Cir. 1995), *overruled on other grounds, Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999). While we agree with the Ninth Circuit that whether *Batson* applies to combined race-gender groups are "worthy of consideration" in light of the changed law, although it declined to decide the issue on procedural grounds. *Turner v. Marshall*, 63 F.3d 807 812 (9th Cir. 1995), *overruled on other grounds, Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999). While we agree with the Ninth Circuit that whether *Batson* applied to combined race-gender groups is a question that merits a determination at some point, we need not decide the issue today.

11 Defendants struck ten out of the fourteen available male jurors. Thus while half the original jury pool was male, the final

of their ten strikes against whites, striking ten of the eighteen white jurors available. Defendants also used both of their alternate strikes to remove while from the alternate jury pool. While striking members of only one race does not always create an inference of purposeful discrimination, the sheer volume.[12]

Further, the district court expressly noted that it considered not just the pattern of strikes, but the "totality of circumstances" in making its determination. See *Allen-Brown,*
243 F.3d at 1298. This suggests that the court took factors such as the race of Defendant and the nature of the crime charged into account when making its determination. We give great deference to the district court's determination of a *prima facie* case, and in light of Defendants' pattern of strikes and the totality of the circumstances, we cannot say that the district court erred in concluding that the government established a *prima facie* case of racial discrimination.

---

jury, prior to re-seating, consisted of only two men. However, since the district court found purposeful discrimination on the basis of race, we will not consider the possibility of gender discrimination in this opinion.

12 In *Central Alabama Fair Housing Center,* we observe that "a showing that a party used its authorized peremptory strikes against jurors of one race does not, , standing alone, establish a *prima facie* case of discrimination" since such strikes may simply reflect the composition of the venire. 236 F.3d at 637. We thus concluded that two strikes against white jurors where 80% of the venire members were white did not, standing alone, support an inference of discrimination, especially since the striking party did not use all of its peremptory challenges. *Id.* at 637-38. The facts in this case are distinguishable. Here, Defendants used not two, but all *ten* strikes to remove whites from a panel that was two-thirds white.

Turning to the second step of the *Batson* analysis, Defendants were required to articulate race-neutral reasons for their strikes. *Batson,* 476 U.S. at 97-98, 106 S. Ct. At 1723-24. Under *Batson,* almost any plausible reasons can satisfy the striking party's burden, as long as the reason is race or gender neutral. Courts have upheld reasons deemed to be superstitious, silly, or trivial, as long as they are race or gender-neutral. *Purkett v. Elem,* 514 U.S. 765, 768, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995). Defendants' reasons clearly satisfy this step.[13]

---

13 Defendants argue that the district court was influenced by its perception of the merits of the stated reasons, a consideration forbidden under *Batson's* second step. *Purkett,* 514 U.S. at 768, 115 S. Ct. At. 1771. They correctly assert that their only burden in this step was to provide a race or gender neutral reason, and they argue that the court erred because it considered whether the stated reasons were good ones, rather than whether they were neutral. Our review of the transcript and order does not support this argument. Although the district court questioned the logic of some of the strikes during the discussion, in its final analysis it clearly indicated that it considered only the genuineness of the reasons provided. The court stated:

> When I reviewed the articulation of contended race neutral explanation[s] for the striking of the jurors in question[,] I do not employ any subjective analysis as to whether I think it is a good or bad reason. Simply put[,] I will use the rationale of whether I can conclude, under the totality of all of the circumstances, that the reason or reasons articulated is an actual, genuine, true or real reasons for the exercise of the peremptory challenges.

Similarly, in discussing the individual strikes, the court did not comment on the merits of the reasons provided and instead emphasized that it found that the stated reasons were not genuine:

> THE COURT: With respect to those individuals I am...not persuaded that a genuine, race-neutral reason for the elimination of those jurors has been articulated.
>
> Admittedly, Mr. Houston does have education and experience in the field of accounting.
>
> Mr. Strakal, has not demonstrated any body language that

On *de novo* review, we are, however, somewhat troubled by the district court's analysis at the third step. Based on the record alone, we are unable to distinguish the court's rationale in denying these four strikes while allowing the other eight. If Defendants' decision to strike a juror who listens to conservative radio stations is considered acceptable despite evidence that there were other jurors with the same characteristic who were not stricken, we do not see how Defendant's decision to strike, for instance, a juror that supervises other employees can be considered discriminatory simply because another juror with a supervisory job was not challenged. We find it difficult to conclude that the government satisfied its burden of showing that these four strikes were pretextual, when similar evidence was rejected for the other strikes.

On the other hand, the district court's perception of an attorney's credibility is an essential part of determining whether a proffered reason was pretextual.

I could see and I have no specification of any body language that he has exhibited which is sufficient to persuade me that the reasons articulated for his elimination was a race neutral reason.

The articulation of the striking Mr. Manders, because he has served on the city council of a small town in south Georgia is a stretch. *That is simply not the reasons why he was struck.*

John McGee, who is a supervisor over sixty employees with the Brunswick Housing Authority was not developed in any way other than by the articulation that he is a supervisor. As to whether there is some other explanation about what goes along with being such a supervisor I won't speculate, but as this record now stands it is my conclusion that the articulated reasons is not a genuine race neutral reason for his having been stricken from this jury panel.

Consequently, he is going to be re-seated along with these other jurors Mr. Houston, Mr. Strakal and Mr. Manders in the place were they were stricken. (Emphasis added)

The record does not always show us definitively what the district court saw and heard. *Miller-El v. Cockrell,* 537 U.S. 322,339, 123 S. Ct. 1029, 1041, 154 L. Ed. 2d 931 (2003) (noting that deference to a district court is "necessary because a reviewing court, which analyzes only the transcripts from *voir dire,* is not as well positioned as the trial court is to make credibility determinations"). It is true that the record suggests that reasonable explanations were offered for the four strike-explanations that are not easily defeated by rebuttal or distinguishable front those presented for the other strikes. However, in considering whether strikes are pretextual, the Supreme Court has asked lower courts to focus on the *genuineness* of the explanation, rather than its reasonableness. *Purkett,* 514 U.S. at 769, 115 S. Ct. at 1771-72.The trial judge is in the best position to evaluate an attorney's candor and ferret out purposeful discrimination. *Miller-El,* 537 U.S. at 339, 123 S. Ct. at 1041.Thus, while we are troubled by the weakness of record evidence in support of these four *Batson* challenges, especially as compared to other strikes, we are constrained to defer to the district court's findings on the genuineness of these reasons and, correspondingly, on the likelihood of purposeful discrimination. Therefore, we find no error in the district court's decision to reject the defendant's peremptory strikes as to jurors Huston, McGee, Strakel and Manders.

We have found not other indication in the record that the district court ignored compelling evidence or applied an incorrect legal standard. Nor do we find any evidence that the district court improperly shifted the burden of proof from the government to the Defendants anywhere along the way. In light of the deference owed to the district courts, and most particularly to their

credibility findings, we must affirm the decision to award the government these four *Batson* challenges.

The *Batson* Remedy

Next, we examine the remedy used to correct the *Batson* violations. The court re-seated the four improperly struck jurors. Since the extra venire persons in the original pool could not be used because they had already been dismissed, the court declined to give Defendants four additional peremptory challenges, to replace the ones lost. The court explained that doing so would require dismissing the entire venire and re-conducting jury selection.

In *Batson*, the "Supreme Court made it clear that the fashioning of remedy [for an unconstitutional strike] is a matter upon which [the lower] courts are to be accorded significant latitude." *Koo v. McBride*, 124 F. 3d 869, 873 (7th Cir. 1997) (discussing Batson); *see* also *McCrory v. Henderson*, 82 F. 3d 1243, 1247 (2d Cir.1996) (holding that the *Batson* "error is remediable in any one of a number of ways"). As with the remedy for any constitutional violation, the lower courts are instructed simply "to take as [their] touchstone the basic proposition that the nature of the remedy must be determined by the nature and the scope of the constitutional violation" *Koo*, 124 F.ed at 873 (citing *Milliken v. Bradley*, 433 U.S. 267, 280, 97 S. Ct. 2749, 2757, 53 L. Ed. 2d 745 (1977)). Additionally, courts are encouraged to take into account the practicalities of the situation. *Id.* We review their chosen remedy only to see if they abused their discretion. *See Batson*, 476 U.S. at 99 n.24, 106 S. Ct. at 1725 n.24; *Koo*, 124 F.3d at 872.

Although it declined to designate a specific

remedy in *Batson*, the Supreme Court has suggested that reinstating an improperly struck juror is one of the remedies available to the trial courts. *Batson*, 476 U.S. at 99 n.24, 106 S. Ct. at 1725 n.24. In appropriate circumstances, we have accepted this remedy in this Circuit. *See, e.g. Stewart*, 65 F.3d at 922-23.[14] In this case, the district court rationalized that re-seating the jurors placed Defendants in the position that they would have been in had they not improperly used their strikes, and that giving them their four strikes back would improperly reward them for violating *Batson*.

The Supreme Court has also been silent on whether disqualified peremptory strikes should be replaced, leaving that question to the remedial power of the lower courts. Some courts have found replacement strikes to be appropriate. *See, e.g., United States v. Ramirez-Martinez*, 273 F.3d 903, 970 (9th Cir. 2001) *overruled on other grounds, United States v. Lopez*, 484 F.3d 1186 (9th Circ. 2007) (en banc) (finding that replacement strikes were properly granted when the lower court held that the *Batson* decision was very close and carefully monitored the government's use of the new strikes). Other courts have refused to grant new peremptory strikes or to dismiss the venire following a *Batson* error, finding that doing so would reward offending conduct by the striking party. *See, e.g., Peetz v. State*, 180 S.W.3d. 755, 760 (Tex.App.Ct 2005) (affirming a decision to deny replacement strikes following a *Batson* error); *People v. Willis*, 43 P.3d 130,

---

14 In addition to re-seating jurors, courts have suggested that "additional jurors might be called to the venire and additional challenges granted to the [injured party]; or in cases where those remedies are insufficient, the jury selection might begin anew with a fresh panel." *McCrory*, 82 F.3d at 1247.

135, 139 (Cal. 2002)(upholding trial court's refusal to dismiss remaining venire when party had engaged in racially motivated strikes against potential jurors); *People v. Moten*, 603 N.Y.S.2d 940, 947 (Sup Ct. 1993) (noting that dismissing entire venire upon a successful *Batson* challenge would reward the wrongdoer and rejecting the remedy). We decline the invitation to craft any kind of bright-line rule to circumscribe the district court's discretion, and find that the circumstances here led to a defensible approach to rectify the *Batson* violation.

The venire in this case was drawn from a geographically diverse pool, and some of the jurors had driven several hours to attend. The *Batson* challenges were decided late in the evening, at around 8:00 PM. The extra venire members, with Defendants' consent, had already been dismissed. Replacement strikes would have required that the court start anew the next day, at considerable time and expense. Although the better practice in certain circumstances is to begin afresh with a new venire, we cannot say that the district court abused its discretion here.[15] Accordingly, we affirm the district court's *Batson* remedy.

---

15 The record does not suggest that the four jurors who were struck and then re-seated knew that they were initially struck, and by whom. We thus have no cause to question the re-seating remedy employed by the district court judge. *State v. McCollum*, 433 S.E.2d 144,159 (N.C. 1993) (observing that "[t]o ask jurors who have been improperly excluded from a jury...to then return to the jury [and] remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward...the defendant, would be to ask them to discharge a duty which would require near superhuman effort...").

II.

The Grady Counts

Walker, joined by the CWW Group and Georgia Personnel, next challenge the sufficiency of the indictment and the evidence used to convict them on the Grady counts. We review *de novo* whether an indictment sufficiently alleges a statutorily proscribed offense. *United States v. Woodruff,* 296 F.3d 1041, 1045 (11th Cir. 2002). We also review *de novo* the sufficiency of the evidence supporting a criminal conviction. *United States v. Silvestri,* 409 F.3d 1311, 1327 (11th Cir. 2005). In doing so, we review the evidence in the light most favorable to the government, "drawing all reasonable inferences and making all credibility choices in the government's favor." *Id.* We will reverse a conviction based on insufficient evidence "only if no reasonable trier of fact could have found guilt beyond a reasonable doubt." *United States v. Gunn,* 369 F. 3d 1229, 1234 (11th Cir. 2004).

The indictment must contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). An indictment is sufficient if "[i]t (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgement under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense". *Woodruff,* 296 F.3d at 1046. An indictment's sufficiency is determined from its face. *United States v. Sharpe,* 438 F.3d 1257, 1263 (11th Cir.2006). An indictment that tracks the language of the relevant statute is sufficient, as long as it also provides a statement of facts and

circumstances that give notice of the offense to the accused. *Russell v. United States,* 369 U.S. 749, 765 82 S. Ct. 1038, 1048, 8 L. Ed.2d 240 (1962).

With regard to the Grady counts, the indictment tracked the language of the mail fraud statute and alleged several facts supporting an overall scheme to misuse Walker's office for private gain and therefore deprive his constituents of their right to his honest services as a legislator. It alleged that Walker attempted to influence legislation affecting the hospital and that, in exchange, his temp agency, Georgia Personnel, received business favors from Grady. The indictment alleged that Walker obtained the financially lucrative Georgia Personnel contract from Grady through a bid-rigging process, which ensured that Walker was allowed to make changes in his bid when necessary, and guaranteed that he was the lowest bidder. Additionally, it alleged that Grady catered to Walker's demands that Grady hire more Georgia Personnel workers. Finally, it alleged that Walker failed to properly disclose his financial dealings with Grady in his annual financial disclosure statements. Taken together, these facts are sufficient to create an overall picture of the fraudulent scheme at issue, to put Walker on notice of the charged conduct, and to enable him to defend himself at trial. *Id.* at 765, 82 S. Ct. at 1048. We find no merit to his claim that the language of the indictment was insufficient to charge him with honest services mail fraud.

We also find that evidence at trial was sufficient to support a conviction for honest services mail fraud. The mail fraud statute prohibits the use of the mails in furtherance of a scheme to defraud. 18 U.S.C §1341. To prove mail fraud, the prosecution must demonstrate

no evidence that Walker was personally a party to this scheme. Further, they argue that the government failed to prove the existence of a quid pro quo arraignment, in that there was no evidence that Walker did anything in particular as a legislator to benefit Grady.

At trial, the government presented evidence that prior to a legislative session where measure affecting Grady would be debated, Walker began meeting with Grady's Chief Executive Officer, Ed Renford. During a meeting at the state capitol, when Renford was meeting with Walker in his legislative capacity, Walker suggested that Grady hire workers through his temp agency. A Grady employee, Joyce Harris, testified that Renford, in Walker's presence, introduced Walker to her as someone who would be doing business with Grady and would help with certain legislation. Renford instructed Harris to do business with Walker, which she interpreted as an order to ensure that Walker's temp employees were hired. Grady employees then solicited a bid from Georgia Personnel, encouraged him to resolve any deficiencies, allowed him to submit the bid out of time, and ultimately awarded the contract to Georgia Personnel. Grady employees testified that Walker repeatedly requested that Grady hire additional Georgia Personnel workers, and that Georgia Personnel hires were cost-ineffective to Grady. They also testified that Renford sought weekly reports on the hires, which was an unusual level of involvement on his behalf. Yet, the government did not come forward with any evidence that Walker improperly influenced any legislation benefitting Grady.

Drawing all inferences in favor of the government, as we must, we find the evidence sufficient

to support an honest services mail fraud conviction. [17] The jury could have inferred that by raising the issue of Georgia Personnel workers at a meeting at the state capitol, Walker let Grady know that his legislative influence would be forthcoming in exchange for Grady hiring his temp workers. Renford's comment about Walker's legislative assistance could also be interpreted as evidence of Walker's participation in the scheme. Finally, the jury could have concluded that by repeatedly requesting that Grady hire additional Georgia Personnel employees, Walker was communicating his belief that he was entitled to the business in exchange for legislative assistance. *See Evans v. United States,* 504 U.S. 255, 274, 12 S. Ct. 1881, 1892, 119 L. Ed. 2.d 51 (1992) (Kennedy, J., concurring) (finding that under the Hobbs Act, a quid pro quo with the attendant corrupt motive can be inferred from an ongoing course of conduct). These inferences support a finding that Walker intended to participate in a scheme to personally gain from his position as a legislator and thus, regardless of the ultimate course of legislation, deprive the public of his honest services. *Antico,* 275 F.3d at 264; *Jain,* 93 F. 3d at 441.

---

17 State legislators often have careers and businesses beyond their roles as a state official, Such [sic] legislators are not guilty of honest services mail fraud just because they engage in business with a company that may be involved in the legislative process. But, we find that the record in this case is sufficient for a reasonable jury to conclude that Walker's activities were not representative of such routine business practices. Instead, it demonstrates a scheme by Walker to enrich himself by using his legislative position as a bargaining tool.

III.

The Medical College Counts

In the Medical College counts, Walker was charged with mail fraud and honest services mail fraud for (1) making false representations to the Medical College officials about his ownership interest in Georgia Personnel and the Augusta Focus in order to get around state rules prohibiting state office holders from contracting with state agencies; and (92) for failure to disclose the transaction. Defendants argue that the fraud alleged in the Medical College scheme is predicated on the violation of state financial disclosure rules and a non-criminal state ethics provision prohibiting legislators from doing business with state entities. They claim that enforcement of state ethics rules is solely within the power of the states, and that prosecution in federal court unconstitutionally infringes on this state power.

The principles of federalism recognize that the states and the federal government exist as dual sovereigns, constraining the federal government from exerting federal power in areas that the Constitution reserves to the states. *See, e.g., Lander v. United States,* 268 U.S. 5, 19, 45 S. Ct. 446, 449, 69 L. Ed. 819 (1925); *Keller v United States,* 213 U.S. 138, 148, 29 S. Ct. 470, 473, 53 L. Ed. 737 (1909). Pursuant to traditional norms of federalism, a federal court may not instruct state officials on how to conform their conduct to state law, because this power is reserved to the states. *Pennhurst State Sch. & Hosp. v. Haldermann,* 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79, L. Ed. 2d 67 (1984). Relying on these principles, Defendants argue that a prosecution predicated on a non-criminal state ethics provision is

unconstitutional, since only the state is entitled to criminalize Walker's conduct.

We disagree. The claims against Walker were not predicated on any violation of state law. In fact, the jury instructions specifically cautioned jurors *not* to decide whether Walker violated any state law, but to consider those laws only to the extent that the evidence indicated on intent to commit fraud on Walker's part. Moreover, an honest services mail fraud or mail fraud conviction does not require proof of a state law violation. *United States v. Hasner,* 340 F. 3d 1261, 1269 (11th Cir. 2003); *see also Langford v. Rite Aid of Ala., Inc.,* 231 F.3d 1308, 1312-13 (11th Cir. 2000) (finding that when a relationship of trust exists between parties, a duty to disclose information can be found even in the absence of a statute or regulation). Thus, the jury could have found that Walker violated the mail fraud statutes by failing to disclose his relationship with the Medical College without considering the state ethics requirement. We therefore find that Walker's federalism claims have no merit, and we affirm the convictions on the Medical College counts.

IV.

Sentencing

Finally, Walker challenges various aspects of the district court's sentencing calculation. For sentencing decisions, we review the district court's factual findings for clear error. *United States v. Crawford,* 407 F.3d 1174, 1177-78 (11th Cir. 2005). However, the district court's decision of whether the factual findings justify a sentencing enhancement is reviewed *de novo. United States v. Barakat,* 130 F.3d 1448, 1452 (11th Cir. 1997)

Walker, joined by the CWW Group, first alleges that the district court erred in calculating that the loss amount related to the forty-six Classic counts was $425.000.[18] Walker was accused of defrauding Classic, a not-for-profit organization established to bring college football to Augusta and to raise money for scholarships for underprivileged students attending college. Walker, the defacto head of the charity, was convicted of using Classic funds for personal purchases and for stealing cash proceeds from the Classics fundraisers. He argues that since he was acquitted of failing to pay taxes on the excess income, there should have been no loss amount attributable to him from the alleged Classic fraud. Further, he claims that all his purchases were approved by the Classic Board of Directors and therefore, no fraudulent expenditures were made.

We have previously rejected the argument that a jury acquittal on one count implies a finding as to the loss amount. *United States v. Hamaker,* 455 F. 3d 1316, 1336 (11th Cir. 2006) (finding that sentencing courts may consider both uncharged and acquitted conduct in determining a sentence). Additionally, review of the record demonstrates that, contrary to Walker's assertions, there is evidence that his activities relating to the Classic counts were not approved by the Classic Board and the court was thus entitled to factor in any related loss. Walker also argues that any loss attributed to him is inexact and is thus unreliable. Although we have held that the district court's loss calculation may not be mere speculation, we have also said that the district court is not required to be completely precise,

---

18 This loss amount, along with the loss associated with the Augusta Focus counts, was used in calculating Walker's adjusted offense level.

and its decision will survive review as long as it makes a reasonable estimate of the loss amount, which the court did here. *United States v. Renick,* 273 F.3d 1009, 1025-26 (11th Cir. 2001). Thus, Walker's argument that the district court's estimate was imprecise is without merit and the loss calculation survives review.

Next, Walker argues that the abuse-of-trust enhancement pursuant to U.S.S.G. § 3B1.3 was improper because there was no evidence that he abused a position of trust at Classic. The abuse of trust enhancement applies "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. We have held that for this enhancement to apply, the government must establish both that (1) the defendant held a place of private or public trust; and (2) abused that position in a way that significantly facilitated the commission or concealment of the offense. *United States v. Ward,* 222 F.3d 909, 911 (11th Cir. 2000). We have also held that this enhancement only applies when the victim conferred the trust. *Untied States v. Garrison,* 133 F.3d 831, 837-39 (11th Cir. 1998).

The record demonstrates that Walker exercised virtually unfettered decision-making in running the Classics charity event. He was also responsible for collecting money earned by the charity. He clearly held a position of trust, granted to him by the Classic Board, which exercised no oversight over his activities. Since that position allowed him to embezzle money from Classic, the criteria for abuse-of-trust enhancement appears to have been met, and we find that the enhancement was properly applied.

Third, Walker argues that the district court erred by imposing an enhancement for misrepresentation of a charitable organization. This enhancement applies when the offense involves "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency." U.S.S.G. § 2B1.1 (b)(8)(A). Walker argues that imposing this enhancement leads to impermissible double counting of the same conduct that was accounted for under the abuse-of-trust enhancement. We disagree and find that the Sentencing Guidelines intend to apply these two enhancements cumulatively. As we have previously noted, each Guidelines section "concerns conceptually separate notion relating to sentencing" and a sentencing court should "apply separate guideline sections cumulatively unless specifically directed otherwise." *United States v. Stevenson,* 68 F.3d 1292, 1294 (11th Cir. 1995). Although we have not directly compared these two enhancements, the Seventh Circuit ruled in *United States v. Arnaud,* 431 F. 3d 994, 999-1000 (7th Cir. 2005), that the two enhancements are distinct and both may be applied because they punish different harms. Here, Walker's conduct harmed the charity, thus meriting an abuse-of-trust enhancement, as well the charity's donors, warranting a separate enhancement for misrepresentation of a charity. We therefore find that the district court did not err in applying both enhancements.

Finally, Walker argues that the court erred in applying the supervisory-role enhancement, U.S.S.G.§ 3B1.1 (b), since there were no other participants in this scheme. This enhancement applies "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more

participants *or* was otherwise extensive." U.S.S.G §3B1.1 (b) (emphasis added). A participant is someone who is criminally responsible for the commission of the offense, regardless of whether he was convicted. U.S.S.G. § 3B1.1, cmt.1. Here, the district court noted that there were no other individuals who could be held criminally responsible for this scheme and thus Walker did not qualify for the enhancement under the "five or more participants" prong. However, the district court found that the criminal activity was "otherwise extensive" and ruled that the enhancement applied under this alternate theory.

As Walker correctly points out, for a criminal activity to qualify as "otherwise extensive," there must still be at least one other participant. *United States v. Holand,* 22 F.3d 1040, 1045 n.8 (11th Cir. 1994). The court thus clearly erred in imposing this enhancement when it separately found that there were no other participants in the scheme. *See id.* We can affirm however, when the result the was correct, even though the reasoning was wrong. *See United States v. Simmons,* 368 F.3d 1335, 1342 911th Cir. 2004). We held in *Untied States v. Eidson,* 108 F.3d 1336, 1345 (11th Cir. 1997), that the employees are participants for purposes of the supervisory-role enhancement when they knowingly further the fraudulent scheme. The record indicates that Augusta Focus employees knew the actual circulation numbers and actively misinformed advertisers of the inflated numbers. Classic employees assisted the fraud by writing checks either to themselves, fellow employees, or to "cash" and then giving the money to Walker. Their efforts to channel money via third parties demonstrates that the [sic] knew that giving the money to Walker was improper. Further, Walker's daughter was indicted for her role in

the fraud and pled guilty to tax charges related to the scheme. Thus, although not recognized by the district court, others participated in Walker's scheme, justifying the application of this enhancement. Accordingly, we find that any error by the district court in its analysis was harmless, and affirm.

Conclusion

In sum, we find that the district court did not err in granting the government's *Batson* challenge against four of Defendants' peremptory strikes, or abuse its discretion in fashioning a remedy for the *Batson* violation. We also find no error with regard to the court's decisions on the sufficiency of the indictment and evidence on the Grady counts, nor do we find any constitutional limitations on Walker's prosecution for the Medical College counts. Finally, we find that any error in the court's sentencing calculation is harmless, and affirm Walker's sentence.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16756-AA

Filed
U.S. Court of Appeals
Eleventh Circuit
Sep 10 2007
Thomas K. Kahn
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES W . WALKER, SR .,
THE CWW GROUP, INC.,
a.k.a. The Walker Group,
GEORGIA PERSONNEL SERVICES, INC.
THE AUGUSTA FOCUS, INC.

Defendants-

Appellants,

Appeals from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, BIRCH and

WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA	*	
	*	
v.	*	
	*	
CHARLES W . WALKER, SR .,	*	CR 104-059
YOLANDA MONIQUE WALKER,	*	
THE CWW GROUP, INC ., GEORGIA	*	
PERSONNEL SERVICES, INC .,	*	
and THE AUGUSTA FOCUS, INC .	*	

ORDER

On the evening of Monday, May 23, 2005, the Government and Defendant Charles Walker[1] objected to each other's allegedly unconstitutional use of peremptory challenges to strike various jurors from the jury . After hearing argument from the parties on the matter, I ruled that Defendant Walker had not meet his burden of showing that the Government used any of its five strikes in an impermissible manner, but that the Government had met its burden of showing that Defendant Walker had purposely used four of his peremptory challenges to discriminate against white males in the venire . In addition to the comments that

---

[1] As stated in the Orders of May 11 & 19, 2005, only Mr. Walker and the three corporate defendants are on trial at this time. For ease of reference, I am referring to these four defendants collectively when I refer to Defendant Walker individually herein.

I made from the bench at that time, I write now to further explain my reasoning behind this ruling. As stated in the Orders of May 11 & 19, 2005, only Mr . Walker and the three corporate defendants are on trial at this time. For ease of reference, I am referring to these four defendants collectively when I refer to Defendant Walker individually herein.

I. Background

In accordance with the Order of May 11, 2005, the jurors in this case were drawn randomly from all six divisions of the Southern District of Georgia. Prior to jury selection, the venire members completed a seven-page questionnaire which the Court had prepared with the parties' assistance.[2] At the time of roll call on the morning of May 23, 2005, about seventy potential jurors were present for jury selection.[3] Upon Defendant's prior motion (doc. no. 103) and Defendant's oral request on the morning of jury selection, individual voir dire was conducted on the thirty-three potential jurors who either indicated in their questionnaire or that morning that they had been exposed to pre-trial publicity or believed that they could not be impartial.[4]

---

[2] Counsel had access to these completed questionnaires from the time of the pre-trial conference held on May 5, 2005 up to the time of jury selection.

[3] Because of the district-wide venire, some of these potential jurors had traveled over four hours to be present at roll call.

[4] The majority of the jurors who required individual voir dire were from the Augusta Division (Burke, Columbia, Glascock, Jefferson, Lincoln, McDuffie, Richmond, Taliaferro , Warren, and Wilkes counties). Notably, the Government had moved prior to trial to exclude the Augusta Division based upon pre-trial publicity,

After excusing some of these potential jurors for cause, forty-seven potential jurors remained. The Court drew forty-two potential jurors at random from this remaining pool so that there would be twenty-eight potential jurors, eight potential alternate jurors, and six more "just in case." Additional individual voir dire was conducted on these forty-two potential jurors. At 6:18 p.m., I kept the twenty-eight potential jurors[5] and eight potential alternate jurors[6] in the courtroom and sent all of the extra potential jurors into the hallway.[7] After the Court afforded the parties ample time to review their notes from voir dire, Defendant exercised all of his twelve peremptory challenges and the Government used

---

but the defense strenuously opposed the motion.

The Court first conducted individual voir dire of those that had indicated that they had been exposed to pre-trial publicity but had not indicated that they were in any way biased. Most of those potential jurors represented that they could render a verdict based solely upon the evidence and the law and without regard to what they may have seen or heard prior to the call of the case. Those jurors were retained in the jury pool. Before moving to the individual voir dire of potential jurors who indicated they could not be impartial, I suggested to the parties that those jurors be excused. Defendant rejected this suggestion, rendering the voir dire process more lengthy than necessary to seat an impartial jury.

[5] The race and gender of these twenty-eight potential jurors is as follows: twelve white males, six white females, one black male, eight black females, and one Indian male.

[6] The race and gender of these eight potential alternate jurors is as follows: four white males, two white females, and two black females.

[7] At 7:07 p.m., the parties consented to the dismissal of these extra potential jurors that remained in the hallway.

six of its eight strikes so that twelve jurors[8] and four alternate jurors[9] remained.[10]

At 7:20 p.m., the Government objected to Defendant's alleged violation of the principle outlined by the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79 (1986), through his use of all of his ten peremptory challenges to remove ten white males from the jury and both of his peremptory challenges to excuse two white male alternate jurors. I directed Defendant to articulate his racially neutral reasons for his peremptory challenges and allowed the Government to rebut Defendant's explanation. At 7:48 p.m., Defendant raised his Batson challenge to the Government's strikes. I allowed the Government to articulate its reasons for its peremptory challenges and, after a brief recess, made my findings relative to the objections at 8:20 p.m. After I placed the four illegitimately-stricken white male jurors back on the

---

[8] The race and gender of these original twelve jurors is as follows: two white males, five white females, one black male, and four black females.

[9] The race and gender of these four alternate jurors is as follows: two white males and two white females.

[10] Pursuant to Rule 24 of the Federal Rules of Criminal Procedure, Defendant had ten peremptory challenges of prospective jurors and two peremptory challenges of prospective alternate jurors. The Government was allowed six peremptory challenges of prospective jurors and two peremptory challenges of prospective alternate jurors . Because the Government only peremptorily challenged five prospective jurors and one alternate prospective juror, I excused the last prospective juror (no. 127, a white female) on the strike sheet and the last prospective alternate juror (no. 32, a black female) on the strike sheet before seating the jury.

jury,[11] the twelve jurors and four alternates were administered their oaths and then left the courthouse by 9:00 p.m.

II. Explanation of Batson's Principles

In Batson, the United States Supreme Court held that a prosecutor' s use of peremptory strikes in even a single case to remove jurors on account of their race violates the Equal Protection Clause of the United States Constitution.[12] See Batson, 476 U.S. at 87 ("[B]y

---

[11] The four white male jurors were placed back in the positions that they had previously occupied and the last four jurors that had made it onto the jury were excused: no. 172, white male; no. 2, white female; no. 120, African-American female; and no. 138, African-American female. Thus, the final composition of the jury is as follows: five white males, four white females, one black male, and two black females.

[12] Soon after the Supreme Court decided Batson, the Eleventh Circuit held that a defendant may not seek Batson relief on the basis of exclusion of jurors based on both race and gender. United States v. Dennis, 804 F .2d 1208, 1210 (11th Cir . 1986) ("It would therefore be inappropriate for us to narrow the 'cognizable racial group,' for present purposes, to include only black males and exclude black females"). Since Dennis, the Supreme Court has extended the reasoning in Batson to also protect jurors against gender discrimination. J .E .B . v . Alabama ex rel . T .B ., 511 U.S. 127, 145 (1994) ("Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of Batson itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination ."). The reasoning of Dennis suggests that its holding was "significantly influenced by the fact that gender had not yet been recognized as a discrete classification." See Commonwealth v. Jordan , 785 N .E .2d 368, 378 n .12 (Mass. 2003). Thus, while neither the Supreme Court nor the Eleventh Circuit have addressed whether Batson and J .E .B. protect groups defined by both gender and race, it appears that the Supreme

denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror."). Since Batson, the [Supreme] Court has reaffirmed the central meaning of Batson in holding that while '[a]n individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race.'"[13] United States v . Allen-Brown, 243 F .3d 1293, 1297 (11th Cir. 2001) (quoting Powers v. Ohio, 499 U.S. 400, 409 (1991)). This principle was extended by the Supreme Court to defense peremptory strikes in Georgia v. McCollum, 505 U.S. 42 (1992). The Supreme Court reasoned that "[j]ust as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal." [14] Id. at 50. Relying on McCollum,

---

Court's case law on the matter supports the recognition of the white male jurors in this case as a protected class. However, as the body of this opinion demonstrates, I do not rely upon this recognition of white males as a cognizable group to reach my conclusion that Defendant used his strikes in an impermissible manner.

[13] As this statement indicates, it is the potential juror's -- not the defendant's – constitutional rights that Batson protects. Prior to Batson, it had been long established that the "Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, . . . [but that] a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'" Batson, 476 U. S. at 86 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880)).

[14] "As a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are .but one state-created means to the constitutional end of an impartial jury and a fair trial. This

the Eleventh Circuit has stated that a "defendant's misuse of the power of the court to deny a citizen her right to participate on a jury because of race is as reprehensible as a prosecutor's." United States v. Stewart, 65 F .3d 918, 923 (11th Cir . 1995); see also United States v. Allen-Brown; 243 F .3d 1293 (11th Cir. 2001) (applying Batson to a African-American defendant's use of peremptory challenges against white jurors).

In addition to holding that parties may not use peremptory challenges to discriminate against jurors based on their race, the Batson Court explained how to determine whether racial discrimination has occurred in jury selection. Batson, 476 U.S. 96-98. The procedure for evaluating a Batson objection to a peremptory challenge is as follows:

> (1) the objector must make a prima facie showing that the peremptory challenge is exercised on the basis of race; (2) the burden then shifts to the challenger to articulate a race-neutral explanation for striking the jurors in question; and (3) the trial court must determine whether the objector has carried its burden of proving purposeful discrimination.[15]

Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." McCollum, 505 U.S. at 57.

[15] When the Eleventh circuit reviews the resolution of a Batson challenge, it gives "great deference to the district court's finding as to the existence of a prima facie case. Once past the prima facie case step, the district court's determination concerning

United States v. Allen-Brown, 243 F .3d 1293, 1297 (11th Cir . 2001). With these principles from Batson and its progeny in mind, I now explain how I applied them to this case.

III. Application of Batson to the Instant Case

A. Defendant's Prima Facie Showing of a Batson Violation

As noted above, Defendant objected to the Government's use of its peremptory challenges to strike four African-American women and one Indian male from the jury in addition to one African-American female alternate juror. In reaching my conclusion that Defendant had not made a prima facie showing that the Government had violated Batson, I relied, in part, upon the fact that the Government did not use all of its peremptory challenges even though there were five more African-Americans who remained on the jury. While it is true that a party can violate Batson without using all of its peremptory challenges, the Eleventh Circuit has repeatedly explained that "the unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a prima facie case of discrimination in the peremptory striking of jurors of that race."[16] Central Alabama Fair Housing Center, Inc.

---

the actual motivation behind each challenged strike amounts to pure factfinding, and for that reason [the Eleventh Circuit] will reverse the district court's determination only if it is clearly erroneous." United States v. Stewart, 65 F.3d 918, 923 (11th Cir. 1995) (citations omitted).

[16] The Eleventh Circuit concluded that the defendants in Lowder Realty had not met their burden of establishing a prima facie case that the plaintiffs violated Batson when they struck two

v. Lowder Realty Co., 236 F .3d 629, 638 (11th Cir . 2000)(collecting cases). After viewing the "totality of the circumstances," Allen-Brown, 243 F .3d at 1298, I found that Defendant failed to establish a prima facie case of a Batson violation and thus I did not need to address his objection further.[17]

---

white jurors because the plaintiffs had only used two of the three peremptory strikes they were allotted and "not all, nearly all, or even most whites on the panel were struck by plaintiffs," Id. at 637 (emphasis in original). The Government in the instant case used its peremptory challenges to remove four of the nine African-Americans ; "not . . . even most" of the African -Americans on the panel. Even if the Indian man who the Government struck is grouped with the African-Americans on the panel, the Government would not have struck most of the racial minorities on the jury.

[17] While "a district court may not require an explanation for a peremptory strike unless and until it satisfies itself that a prima facie case has been established," Lowder Realty Co., 236 F .3d at 636 (emphasis added), I allowed the Government to articulate its racially neutral reasons for striking these jurors because it was ready and willing to do so. The Government noted that the first juror that it struck had stated that she could not be impartial and also had a hardship. The second juror struck knew two defense witnesses. The third juror struck knew Defendant Walker's son who is a defense witness. She also stated that she could not be impartial. The fourth juror struck is a doorkeeper for the Georgia legislature and had stated during individual voir dire that she admired Defendant Walker. The fifth juror struck knew a defense witness. The only alternate juror struck by the Government also knew a defense witness. The Government closed its articulation by claiming that it had struck every juror who knew a defense witness. While such a conclusion is not necessary because I found that Defendant had not shown a prima facie Batson violation, I note that the Government's articulated reasons would have been highly persuasive during the third step of a Batson analysis.

B. Government's Prima Facie Showing of a Batson Violation

In contrast, the Government did establish a prima facie case that Defendant violated Batson by striking white males from the jury. As noted above, Defendant used all ten of his peremptory challenges to remove fifty-six percent of the white potential jurors who made up sixty-four percent of the panel.[18] If Defendant had exercised his ten peremptory challenges in a completely random manner, there was a 0.33% chance that the strikes would have been exercised against ten white jurors. See Lowder Realty Co., 236 F.3d at 637 n.1 (explaining how to calculate probability of striking white jurors). In addition to the inference of discrimination created by this statistically improbable application of strikes, the "totality of the circumstances"[19] compelled me to act because I had "a

---

[18] Defendant also used both of his two alternate juror peremptory challenges to remove a third of the white potential alternate jurors. Turning to the question of gender discrimination, Defendant also struck most of the males on the jury when he removed ten of the fourteen men on the panel . The combination of the categories of race and gender reveals that Defendant struck eighty- three percent of white males on the jury. See note 12, supra.

[19] In addition to the number of jurors of a particular category struck, the Eleventh Circuit has identified the following "relevant circumstances" for district courts to consider when evaluating a prima facie case: (1) a "pattern" of strikes against venire members of one race, (2) questions or statements during voir dire or in exercising challenges that suggest a discriminatory purpose, (3) the racial composition of the pool of remaining potential jurors, (4) the race of the defendant, and (5) the nature of the crime charged. Allen-Brown, 243 F .3d at 1297-98. Defendant's use of all of his peremptory challenges to strike white males certainly qualifies as a pattern.

reasonable suspicion that Constitutional rights [were] being violated in [my] presence ." Allen-Brown, 243 F.3d at 1298.

C. Defendant's Articulation of Race-Neutral Reasons

Once the Government carried its burden of establishing a prima facie case, the Court directed Defendant to articulate his race neutral reasons for striking the ten white men.[20] Proceeding in the order in which the peremptory challenges were exercised, Defendant stated that he struck Juror Number 160 because he is an accountant and Defendant's defense strategy involved attacking accounting principles. Defendant claims that he removed Juror Number 24 because he was evasive under individual voir dire and because he had previously served on a grand jury. Juror Number 30 was struck because he has an accounting degree and also because he allegedly lied when he stated that he reads a newspaper that has had a lot of coverage on this case yet claimed that he did not know anything about the case. Defendant removed Juror Number 137 because he knew a government investigator, listens to a conservative radio talk show host, knew about the case, and is a member of a yacht club. Defendant used his fifth peremptory challenge against Juror Number 98 because he listens to Christian gospel music and Fox News. Juror Number

---

[20] Defendant struck potential alternate Juror Number 17 because he is a member of Sons of Confederate Veterans and opposed the Georgia legislature's decision to re -design the state flag. Defendant removed Juror Number 116 from the pool of potential alternate jurors because he is a lawyer and had been a criminal investigator while serving in the military.

93 was removed because he listens to Christian radio and works for the Department of Defense. Defendant struck Juror Number 69 because of his "body language" during voir dire and because he watches Fox News. Juror Number 97 was struck because he reads the Drudge Report and listens to "ultra-conservative" radio personalities such as Rush Limbaugh. Defendant struck Juror Number 159 because he had previously served on the city council of a small town and Defendant was worried that this juror would try to extrapolate "small town" politics to state politics. Defendant used his last peremptory challenge to strike Juror Number 56 because he supervises employees.

D. Government's Showing of Purposeful Discrimination

After Defendant stated his reasons for striking these potential jurors, the Court permitted the Government to present evidence to rebut Defendant's articulated reasons. Based on the strength of its rebuttal evidence, the Government carried its burden of showing that Defendant purposefully discriminated against Juror Number 160, Juror Number 69, Juror Number 159, and Juror Number 56 on account of their race. For example, the Government demonstrated that Defendant's articulated reasons for striking Juror Number 160 and Juror Number 56 were pretextual by pointing out that Defendant did not strike Juror Number 54 (a white female) who has both of the characteristics (accounting skills and supervisory job) that Defendant relied upon to justify striking Juror Number 160 and Juror Number 56. Furthermore, the Government adequately demonstrated that the fact that Juror Number 159 had previously served on the city council of a small town was not the real reason that

Defendant removed this juror from the jury. Turning to the reason given for striking Juror Number 69, Defendant did not explain what troubled him about this juror's "body language." "[W]here the proffered race-neutral explanation centered on the juror's 'body language' and 'mannerisms' . . . , behaviors that are especially given to on-the-spot interpretation," United States v. Cordoba-Mosauera, 212 F.3d 1194, 1198 (11th Cir . 2000), the Court is in as good a position as Defendant to compare the stricken juror's behavior during voir dire to other jurors' mannerisms. Based on my observations that Juror Number 69 did not exhibit any negative "body language" and Defendant's failure to elaborate what bothered him about this juror's "body language," I concluded that Defendant offered more rationalization than reason when he explained why he removed Juror Number 69 from the jury.

E. Remedy for Defendant's Batson Violation

After determining that four jurors had been impermissibly struck, I asked the parties for advice on how to craft a remedy for this constitutional violation.[21] While Defendant argued that he should regain the four peremptory challenges that he had improperly exercised, the Government correctly noted that Defendant had previously consented to the dismissal of the remaining potential jurors who had been patiently

---

[21] "In fashioning a remedy for any constitutional violation, a court ought to take as its touchstone the basic proposition that the nature of the remedy must be determined by the nature and the scope of the constitutional violation . It is also necessary to take into account the practicalities of the situation." Koo v. McBride, 124 F.3d 869, 873 (7th Cir . 1997) (discussing remedy for a Batson violation and citing Milliken v . Bradley, 433 U .S . 267, 280 (1977)).

waiting in the hallway and that no additional jurors remained in the courthouse which Defendant could strike. After considering all of the available options, I reinstated Juror Number 160, Juror Number 69, Juror Number 159, and Juror Number 56 on the jury. While the Supreme Court has not decided how a Batson violation should be remedied,[22] the Eleventh Circuit has upheld the re-seating of an illegitimately-stricken juror as a remedy for a Batson violation. See Central Alabama Fair Housing Center Inc. v. Lowder Realty Co., 236 F.3d 629, 632 (11th Cir . 2000); United States v. Stewart, 65 F.3d 918, 922-23 (11th Cir. 1995). In a case where an African-American defendant exhibited group bias in exercising his peremptory challenges to exclude white male prospective jurors, the California Supreme Court noted that "situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial."[23] People v. Willis,

---

[22] The Batson Court stated in a footnote that "[i]n light of the variety of jury selection practices followed in our state and federal trial courts . . . we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." Batson, 476 U.S. at 99 n.24 (citations omitted).

[23] The California Supreme Court explained further that the Willis case "vividly demonstrates the need for the availability of some discretionary remedy short of dismissal of the remaining jury venire. Here defendant, through counsel, originally sought that very remedy as a ready means of curing a perceived imbalance in the initial jury venire. Failing to achieve that end through appropriate proof, the defense then engaged in a series of coincidently improper and biased peremptory exclusions, aimed at indirectly accomplishing what it could not directly achieve , thereby

43 P .3d 130, 137 (Cal . 2002). Based on the nature of Defendant's Batson violations , the dismissal of the venire in this case would have been an ephemeral remedy. Therefore, the reseating of the stricken jurors was the only adequate available remedy.

IV. Conclusion

Even though I made my oral ruling on this matter at 8:20 p.m. after a long day of jury selection and, as I noted to the parties on the morning of Tuesday, May 24, 2005, I may not have been as articulate in my statements on this issue as I would have liked to have been, I am as confident now as I was then that a constitutional violation occurred during jury selection, the appropriate remedy was administered, and an impartial jury was impaneled.

ORDER ENTERED at Augusta, Georgia, this 31st day of May, 2005.

/s/
UNITED STATUS DISTRICT JUDGE

---

violating the People's right to a representative and impartial jury. To remedy that improper course of conduct by dismissing the remaining venire not only would reward such conduct and encourage similar conduct in future cases , but also would frustrate the court's substantial and legitimate interest in the expeditious processing of cases for trial." Willis, 43 P.3d at 135.